SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 121

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., et al.,
Petitioners,

vs.

GEORGE ROMNEY, Secretary of Housing and Urban Development, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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IN THE

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OCTOBER TERM, 1969

No. .....

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., et al.,
Petitioners,

vs.

GEORGE ROMNEY, Secretary of Housing and Urban Development, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

The Petitioners, South Hill Neighborhood Association, Inc., a non-profit incorporated association of the Commonwealth of Kentucky, Curtis Harrison, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis on behalf of themselves and all other United States or Kentucky citizens, taxpayers, property owners and historic preservation groups and persons similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on Novem-

ber 24, 1969. Respondents are George Romney, Secretary of the United States Department of Housing and Urban Development; the City of Lexington, Kentucky, a Municipal Corporation; Honorable Charles Wylie, Mayor of the City of Lexington; the Board of City Commissioners of the City of Lexington; Joseph Graves, Member of the Board; Harry Sykes, Member of the Board; Fred Fugazzi, Member of the Board; Thomas Underwood, Member of the Board; Urban Renewal and Community Development Agency of the City of Lexington, a Municipal Corporation; Robert E. Featherston, Chairman of the Agency; William R. Embry, Vice-Chairman of the Agency; Byron Romanowitz, Member of the Agency; D. C. Noble, Member of the Agency; H. J. Hagler, Member of the Agency; Jennie Bryant, Director of the Agency; Citizens Union National Bank and Trust Company, Inc., a Kentucky Corporation; Norwood Construction Company, Inc., a Kentucky Corporation; J. Norwood Hodge, President of Norwood Construction Company.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears at Appendix 61-64. The opinion and order of the United States District Court for the Eastern District of Kentucky, entered on November 14, 1969, in this proceeding appears at Appendix 47-60.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 24, 1969. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

QUESTIONS PRESENTED

1. Whether Public Law 89-665 and Public Law 89-754 apply to execution of urban renewal plans already approved by the Secretary of Housing and Urban Development prior to the date of those Acts, and require the Secretary to comply with their prescribed administrative procedures prior to approving demolition by a local public agency of buildings comprising an Historic District listed on the National Register for Historic Places.

2. Whether historic preservation organizations, state and federal taxpayers, and owners of property listed upon the National Register of Historic Places have standing as class representatives to obtain judicial review in federal court of the administrative decision by the Secretary of Housing and Urban Development refusing to comply with Section 106 of the National Historic Preservation Act of 1966 regarding demolition by a federally-funded local public agency of buildings listed on the National Register for Historic Places.

3. Whether local public agencies constitutionally can condemn and demolish National Register properties by acting through administrative procedures which involve violations of the regulatory provisions of the Urban Renewal Handbook, private meetings and the participation of agency members with private pecuniary interests in property situated in the urban renewal area.

STATUTORY PROVISIONS INVOLVED

5 U. S. C., § 702. **Right of review.**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U. S. C., § 704. **Actions reviewable.**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the re-review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

16 U. S. C., § 470f. **Effect of Federal undertakings upon property listed in the National Register; comment by Advisory Council on Historic Preservation.**

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i-470m of this title a reasonable opportunity to comment with regard to such undertaking. Pub. L. 89-665, Title I, § 106, Oct. 15, 1966, 80 Stat. 917.

The texts of Public Law 89-665 and Public Law 89-754, which contain various other statutory provisions also in-

volved here, are printed at Appendix 64-80. Statutes pleaded in the Amended Complaint as a basis for subject matter, substantive and remedial jurisdiction of the United States District Court are not published here, and are cited at Appendix 27-28 and 42-43.

STATEMENT OF THE CASE

The National Register for Historic Places, begun in 1935 and expanded in 1966, is maintained by the National Park Service of the Department of Interior under the provisions of the National Historic Preservation Act of 1966. Currently listed on the National Register are 1606 unique historical properties, with more being added rapidly. The Department of Interior expects that 16,000 nominations of new National Register listings from forty-five states will be submitted during 1970 alone. The Register will be expanded eventually to include an estimated 100,000 such properties. Many of the existing 1606 National Register properties are situated inside urban renewal areas in various American cities. Many of the prospective 100,000 National Register properties are similarly situated. These historic properties are left vulnerable to demolition by federally-funded agencies because of the lower court rulings in this case.

Fourteen buildings located on the North side of the street in the 100, 200 and 300 blocks of West High Street in Lexington, Kentucky, for many years have been widely known as historic properties because of their age, history and architecture. Some of them were 200 years old. These historic buildings were included within the urban renewal area of the Lexington Urban Renewal Area Project Ky R-63 when that project was originated and funded in 1966 and have remained so through two project amendatories in 1968 and 1969. The urban renewal plan originally contemplated razing all fourteen buildings but was

amended in 1968 to permit historic preservation of the seven buildings on the 200 block as an alternate reuse.

These fourteen buildings were enrolled on the National Register for Historic Places as the "West High Street Historic District," on July 10, 1969. A week later the Respondent Urban Renewal and Community Development Agency of the City of Lexington, acting with knowledge of this National Register status, sold the land on the 200 block to Respondent Citizens Union National Bank for commercial redevelopment. The agency subsequently contracted with Respondent Norwood Construction Company to demolish the seven National Register buildings located there. These actions by the local public agency leading to destruction of the National Register properties were taken with the formal approval of the Department of Housing and Urban Development which also had knowledge of their historic character.[1]

Demolition of the buildings was commenced by the local public agency and demolition contractor during the night of October 15, 1969, precipitating the first of three connected cases, culminating in the federal action here for review.

Petitioners instituted action in Fayette Circuit Court against the local and private parties on October 16, 1969, alleging violations of federal and state statutes and seeking a temporary injunction in order to preserve the buildings long enough to prepare and file this federal court action. The state court issued its temporary restraining order that morning, but not before two of the National

[1] Both the local public agency and HUD knew of the historic nature of the buildings long before they were listed on the National Register. Actual knowledge of National Register listing came to the local public agency on July 12, 1969, and HUD was on notice at least as early as August 5, 1969, when notice of National Register listing was published in the Federal Register.

Register buildings were substantially destroyed. The state court dismissed the suit on October 21, 1969, on the ground that it failed to state a cause of action under state statutes against the local and private defendants. Appendix 1-8. The Kentucky Court of Appeals affirmed on October 22, 1969, in an order without opinion. Appendix 9. The local public agency in its Answer counterclaimed for $1,000,000 damages and the demolition contractor counterclaimed for $30,000 damages, and these Petitioners replied with denials and affirmative defenses based on the federal statutes involved here. That phase of the action is currently pending before the Fayette Circuit Court and Respondents intend to press for trial soon.

The local public agency had filed condemnation actions in the Fayette Circuit Court in June 1968 against the historic properties located on the 300 block of West High Street and owned by Petitioners Kafoglis and Dennis. Petitioners contested the taking on state and federal statutory and Constitutional grounds. After the federal action was concluded on November 24, 1969, Respondents pressed for trial in the condemnation suit. The Fayette Circuit Court on December 24, 1969, held that the local agency had the right to condemn the Kafoglis and Dennis properties, Appendix 10-26, and on January 14, 1970, ordered that the local public agency have possession of the land. Appendix 80-83.[2]

This federal class action was instituted on October 15, 1969, by Complaint filed in the United States District Court for the Eastern District of Kentucky (Lexington) alleging federal statutory and constitutional grounds, asking for declaratory judgment and seeking to enjoin

[2] Petitioners propose to petition this Court for certiorari review of these state court actions also and seek to have them consolidated with this case for review before this Court. The relevant opinions and orders rendered in those cases appear as appendices for the information of the Court.

destruction of the buildings pending mandated performance by George Romney and the local public agency of their federal administrative duties under Section 106 of the National Historic Preservation Act of 1966, the Demonstration Cities and Metropolitan Development Act of 1966 and HUD regulations implementing those federal laws. Appendix 27-43. The Federal District Court issued a temporary restraining order on October 22, 1969, restraining demolition of the fourteen buildings. Appendix 44-47. Respondents challenged the action on grounds that Petitioners lacked standing to sue and the 1966 legislation did not apply. The Federal District Court dismissed the Amended Complaint on November 14, 1969, on the ground that Petitioners had no standing to sue and on the additional ground that the 1966 legislation is not applicable to urban renewal projects or amendatories already approved by the Secretary prior to National Register listing. Appendix 47-60. Petitioner appealed and applied to the Federal District Court for an injunction pending appeal which was denied on November 19, 1969. Appendix 60-61. Petitioner applied to the United States Courts of Appeals for the Sixth Circuit on November 17, 1969, for an injunction pending appeal. The Court of Appeals denied the injunction pending appeal and affirmed the judgment of the District Court on November 24, 1969, on the ground that the appeal was frivolous. Appendix 61-64.

The Sixth Circuit Court of Appeals entered its order dismissing the appeal in the late afternoon of November 24, 1969, and telephoned notice of its ruling to Lexington. Demolition commenced within an hour and before midnight seven National Register buildings were destroyed. Nevertheless, half of the West High Street Historic District is still standing: three buildings on the 100 block, one on the 200 block and three on the 300 block. The local public agency has already agreed to sell the 300 block to a commercial redeveloper who proposes to erect a Hilton

motor hotel on the land. The agency intends to raze the three condemned National Register buildings on the 300 block immediately.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Disposed of Important Questions of Federal Law Which Should Be, But Have Not Been Decided by This Court.

This is a case of first impression under the 1966 historic preservation legislation.

Novel questions of federal law gravely affecting matters of far-reaching public importance were determined by the lower court. The entire Congressional program for protecting and preserving America's historic properties from senseless destruction is jeopardized by the lower court ruling.

Moved by the need to halt destruction of historic properties by federal agencies, Congress enacted a comprehensive legislative scheme in 1966 for a nationwide program of historic preservation involving federal, state, local and private efforts. The Demonstration Cities and Metropolitan Development Act of 1966, Public Law 89-754, amended the Housing Act of 1949 to require that urban renewal plans include information about historic properties located inside urban renewal areas, extended the soft loan program to cover rehabilitation of historic structures and established a federal grant program for a comprehensive historic preservation program to be initiated and administered by the states. Appendix 74-80. The National Historic Preservation Act of 1966, Public Law 89-665, authorized expansion of the National Register for Historic Places to include nonfederally-owned properties, created a National Advisory Council on Historic Preservation and in Section 106 promulgated administrative pro-

cedures for federal agencies to follow before National Register properties can be destroyed with federal money. Appendix 64-74.

The 1966 historic preservation legislation became effective on October 15, 1966. On that date approximately 1,812 federally-funded urban renewal projects were already in existence in this country with their urban renewal plan approved by the Secretary of Housing and Urban Development. Since that date only some two hundred more have been added to that total. The lower court ruling substantially restricts application of the 1966 legislation only to those 200 projects.

The lower court accepted the contention by Respondent George Romney that Section 106 of the National Historic Preservation Act of 1966 is not applicable to demolition of National Register properties by local public agencies pursuant to urban renewal plans already approved by the Secretary prior to National Register listing. This interpretation exempts nine-tenths of the urban renewal plans in this country from the prohibitions of the 1966 legislation and exposes countless thousands of historic properties to demolition despite future National Register status.

The key federal statute protecting National Register properties from destruction by federally-funded or federally-licensed agencies is Section 106 of the National Historic Preservation Act of 1966, P. L. 89-665, 16 U. S. C. 470f.

Petitioners contended below that Section 106 makes mandatory on the Secretary two distinct but related administrative procedures which he should have performed in this case: (1) He "shall" . . . "take into account" the effect of a federally-assisted "undertaking" on any properties listed on the National Register prior to "approval of the expenditure of any federal funds" on the "undertaking;" and (2) He "shall" afford the Advisory Coun-

cil on Historic Preservation a reasonable opportunity to comment with regard to "such undertaking."[3]

The lower court rejected these contentions on grounds that the section was inapplicable altogether. The reasoning of the Federal District Court adopted by the Sixth Circuit Court of Appeals was:

> 16 U. S. C. 470f and the duty contained therein refers only to times when plans or amendments to plans are authorized and resulting loan and capital grant contracts are entered between HUD and local urban renewal agencies. Any other construction of the statute would place too great a burden on the urban renewal administrative process. See Judge Thornton's opinion in Kent County Council for Historic Preservation v. George Romney, Civil Action No. 6174 (W. D. Mich., October 2, 1969). Even if plaintiffs did have standing, approval of the last amendment to the plan, Ky. R-63, was prior to the listing of the buildings on the National Register. Thus, 16 U. S. C. 470f imposed no duty on HUD to notify the Advisory Council on Historic Preservation.

Appendix 59.

This erroneous construction of Section 106 leaves the new federal law of historic preservation totally confused

[3] The issue is clearly presented by this case and the relevant facts are uncontroverted. The local public agency admittedly never conducted an historic survey of the urban renewal area and never noted the existence of historic properties on any of its plans, maps or documents as required by the 1966 amendments to the Housing Act and HUD regulations; and, the Secretary admitted that he never required the local public agency to comply with these regulations. The Secretary also admitted that he did not comply with Section 106 although he was on notice of the National Register listing, namely, he did not take into account the effect of demolition on these National Register properties nor did he refer the matter for comment to the Advisory Council. Both of those Respondents flatly refused to do so when Petitioners demanded that they comply with Section 106 prior to this action.

because it ignores both the plain meaning of the statutory language and the intent of Congress.

First, the plain meaning of the statutory language is that its requirements apply to local public agency "undertakings" entailing destruction of National Register properties regardless when the demolition occurs. The lower court ruling equates "undertaking" with initial approval of an urban renewal plan or formal amendatories. No definition for "undertaking" is provided in the National Historic Preservation Act itself, and the legislative history of that Act reveals that the word "project" was first used and then replaced by "undertaking." No special definition was required for urban renewal agencies because the Housing Act of 1949 defines "undertaking" to include "demolition." 42 U. S. C., § 1460(c). It seems clear that the word "undertaking" in both the first and second sentences of Section 106 means simply "demolition" when applied to the facts of this case since it is that action which is having an obvious "effect" on the National Register properties. The loan and capital grant contract here, executed in June 1966, had no definable "effect" on these properties, nor did the 1968 and 1969 amendatories. Contracts do not destroy buildings—bulldozers do.

Nothing in Section 106 or Public Law 89-665 suggests that the federal administrative duties there prescribed for the Secretary are limited to those occasions when he formally approves loan and capital grant contracts, as suggested by Judge Thornton in Kent County Council for Historic Preservation v. George Romney, 304 F. Supp. 885 (W. D. Mich., 1969), or formal amendatories, as suggested by the Federal District Court in this case. The Housing Act itself requires the Secretary's approval of plans and amendatories submitted by local public agencies for federal funding. 42 U. S. C., § 1451. Similarly, self-imposed HUD regulations require that the Secretary

formally approve every significant action performed by local public agencies in execution of the urban renewal plan which entails expenditure of federal funds. The formal HUD "approvals" actually given in this case prior to destruction of these National Register properties were to the Contract for Disposition of Land for Private Redevelopment, Urban Renewal Handbook RHA 7209.4, Ch. 4, § 3, page 2, 2/68, and to the Award of Demolition Contract, Urban Renewal Handbook, RHA 7209.4, Ch. 4, § 3, page 2, 2/68.

Secondly, reference to the legislative history of the National Historic Preservation Act of 1966, companion legislation and the legislative scheme clearly reveals the intent of Congress to make Section 106 immediately applicable to existing federally-funded programs, and to compel administrative review by the Secretary of local public agency decisions to demolish National Register properties.

Section 106 did not appear in the proposed original bill (S. 3035), and the Secretary of Interior would have controlled the matter administratively. Senate Report 1363, Calendar No. 1328, 89th Congress, 2d Session, July 7, 1966, pp. 11-12. A version of Section 106 appeared in S. 3098, a parallel bill, and was added to S. 3035 by Senator Jackson following suggestions of immediate need for it by Mr. Gordon Gray, Chairman of the National Trust for Historic Preservation, and Mr. Frank Harrison of the National Park Service. Hearing before the Senate Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, June 8, 1966, pp. 21-27. The House Committee report stated:

> To help provide the protection which is needed, S. 3035 authorizes the Secretary of the Interior to maintain a register of areas, structures, and objects which are significant historically, architecturally, archeologically, or culturally. This register, which will con-

> sist of places of local, state and regional, as well as national, significance will service as a convenient guide to properties which should be preserved for the inspiration and benefit of this and future generations. The committee agreed that Federal agencies having direct or indirect jurisdiction over various undertakings, either through Federal funding or through their licensing powers, should recognize these values. The bill therefore requires such agencies to afford the Advisory Council on ample, fair, and reasonable opportunity to comment with regard to such proposed undertakings before they are commenced.

House Report No. 1916, Cong. Record, Vol. 112, p. 3307 at 3310 (1966).

Contemporaneously with enactment of Public Law 89-665, Congress also amended the Housing Act of 1949 by means of the Demonstration Cities and Metropolitan Development Act of 1966, Public Law 89-754, to permit urban renewal agency funds to be used for historic preservation. Title VII of Public Law 89-754 amended the Housing Act to recite the need for "timely action" in the field of historic preservation, 42 U. S. C., § 1500(c), and established a new federal grant program for historic preservation. More significantly, Public Law 89-754 amended the Housing Act to require that urban renewal plans be "sufficiently complete to indicate" historic and architectural preservation activities by local public agencies. 42 U. S. C., §§ 1460(b) and (c). These changes in existing law were designed to work together with Public Law 89-665. House Report No. 1931, Congressional Record, Vol. 112, p. 3999 at 4032 (1966).

The Department of Housing and Urban Development regulates closely the activities of local public agencies by means of its Urban Renewal Handbook. HUD implemented its interpretation of the 1966 historic preservation legislation by revision of these administrative regulations

on April 8, 1968, and since that date elaborate requirements relating to historic preservation and protection have been imposed on the reporting, planning and execution phases of the urban renewal process. HUD apparently takes the position that these regulations apply **only** to urban renewal plans and amendatories approved by HUD after October 15, 1966. By this expedient HUD evades its primary responsibility for protection of historic structures located in existing urban renewal areas from federally-funded destruction. The effect of this ruling—if allowed to stand—is to permit most local public agencies to continue destroying historic properties with impunity, unrestrained by the 1966 legislation, thereby thwarting the purpose of Congress when it enacted the 1966 historic preservation legislation and the efforts of historic preservation groups to protect them through National Register listing.

2. **Conflict Between the Decision Below and Previous Decisions by This Court.**

The unprecedented ruling by the courts below that these Petitioners lacked standing to sue conflicts with principles established by previous decisions of this Court and runs counter to the developing trend in the law in favor of class actions brought in the public interest by private citizens who have a personal stake in the outcome. This ruling has devastating effect on the growing historic preservation movement in this country.

Millions of Americans are interested in historic preservation. Many of these individuals are actively involved as members of one or another of the 939 known public and private historic preservation organizations located in 489 communities in this country. The National Trust for Historic Preservation alone has 22,000 dues-paying members. Every state and territory has one or many such organized groups. The state of Kentucky has established a quasi-governmental agency primarily concerned with historic

preservation, appointed a State Liaison Officer for Historic Preservation and established a National Register Review Committee to implement its statewide efforts. There are dozens of organized historic preservation groups active in various Kentucky communities. The city of Lexington alone contains numerous historic preservation organizations involving several hundred Lexingtonians.

Congress funded the federal historic preservation grant program in 1966 with $32 million for a four-year period. Only seven states participated in 1967. However, thirty-eight states applied in 1968 for $1.5 million in federal funds under the program to survey their states for historic properties, nominate qualified sites for listing on the National Register, and preserve them for the benefit of the public. The Department of Interior expects forty-five states to participate in 1969. State historic preservation agencies are expected to apply for several hundred millions in federal matching grants for their activities in the upcoming years. The State of Kentucky alone has recently announced a 5-year program of historic preservation costing an estimated $18 million.

Petitioners represent a large class of individuals and organized groups interested and active in historic preservation in Lexington, Kentucky. In addition, individual Petitioners own two of the National Register properties now threatened with destruction.[4]

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[4] Since one of the primary issues here is Petitioners' standing to sue, the following are uncontroverted facts underlying their standing qualifications:

Petitioner South Hill Neighborhood Association is a private, non-profit membership association incorporated under Kentucky Revised Statutes Chapter 273 with offices in Lexington, Kentucky and a central corporate purpose of historic preservation. The corporation has several hundred members, the majority of whom live in the so-called "South Hill neighborhood" adjacent to the West High Street Historic District, and many of them own property situated in that neighborhood.

The Blue Grass Trust for Historic Preservation, Inc., a party below, is a private, nonprofit membership association incorporated under Kentucky Revised Statutes Chapter 273 with offices

The administrative proceedings here involved were challenged as being in violation of federal statutes and the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution. Petitioners asserted standing to invoke the federal statutes arising from their status as citizens, residents, taxpayers, property-owners and historic preservationists.

Congress clearly intended to designate interested private persons and historic preservation groups as statutory beneficiaries entitled to enforce the National Historic Preservation Act of 1966 and the Demonstration Cities and Metropolitan Development Act of 1966.

The President of the United States, in his speech of February 23, 1966, on the quality of our environment said, "Historic preservation is the goal of citizens' group in every part of the country." He went on to announce that he was recommending to Congress the legislation here involved. Secretary of Interior Udall noted in his letter transmitting the proposed legislation to Congress that the National Register was being expanded to include privately-

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in Lexington, Kentucky, and a central purpose of historic preservation in the city. The Blue Grass Trust is affiliated with the National Trust for Historic Preservation and acts as caretaker for the "John Hunt Morgan House," a historic structure in Lexington, and is restoring the "Henry Clay Law Office."

Petitioner Curtis W. Harrison is a citizen, taxpayer, resident and property-owner in Lexington, Kentucky, and a member of several historic preservationist groups, among them the two organization parties here and Historic Lexington, Inc., a similar non-profit incorporated membership association in Lexington. Harrison is president of the South Hill Neighborhood Association, Inc. He was serving as Secretary to the National Register Review Committee for the Commonwealth of Kentucky when that agency nominated the buildings here in controversy for listing on the National Register, and, as such, he prepared and transmitted the necessary documents to the Keeper of the National Register on July 9, 1969.

Petitioners Anna Kafoglis and Mr. and Mrs. W. T. Dennis are citizens, residents, taxpayers, members of historic preservation groups—including those involved here—and property owners in Lexington, Kentucky. They own the two National Register buildings located at 315 and 317 West High Street. Each of them seeks to preserve and restore their properties.

owned historic properties for the first time. House Report 1916, Cong. Rec., Vol. 112 (1966), pp. 3312-3313. The original bill (S. 3035) made no reference to private historic preservationist activities and was redrafted by Senator Jackson at the behest of Mr. Gordon Gray, Chairman, National Trust for Historic Preservation, and Mr. Frank Harrison, National Park Service, expressly to acknowledge and emphasize the interests of private historic preservation groups and individuals. That reference appears in the Congressional finding and policy statement of the Act which is 16 U. S. C., § 470(d). Hearing before the Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, United States Senate, 89th Congress, 2d Session, on S. 3035 and S. 3098, June 8, 1966, page 18. The Senate Committee Report reflects that the legislation offers a role to "private organizations which are willing to play their part in preserving our historic and cultural heritage." Senate Report No. 1363, "Preservation of Historic Properties," June 30, 1966, page 6. The House Committee noted the legislation would "provide needed encouragement and assistance to public and private efforts to protect" historic properties. House Report 1916, Cong. Rec., Vol. 112 (1966), pp. 3312-3313. The preamble and body of the Act not only specifically refer to private groups and individuals interested in historic preservation, they also utilize them and their efforts in the legislative scheme of the Act: "Project" is defined to include private efforts, 16 U. S. C., § 470a(b)(2); several duties and activities of the Advisory Council run to private historic preservation groups, 16 U. S. C., § 470i (a) (1) and (5); and the Advisory Council itself is constituted with a majority made up of individuals "from outside the Federal Government." 16 U. S. C., § 470i.

The text and legislative history of the Demonstration Cities and Metropolitan Development Act of 1966, Public

Law 90-754, demonstrates a similar emphasis on private historic preservationists as a conscious policy choice. Public Law 89-754, § 605, and House Report 1931 on "Demonstration Cities and Metropolitan Development Act of 1966," Public Law 89-754, Congressional Record, Vol. 112 (1966), page 3999 at 4033.

Petitioners thus come within the principles established by this Court in **Hardin v. Kentucky Utilities**, 390 U. S. 1 (1968), and **El Paso Natural Gas Company v. FPC**, 386 U. S. 129 (1967), that express or implied beneficiaries of a federal statutory scheme have standing to sue in actions under the statute.

The judgment below also conflicts with the principles of recent federal court decisions in closely analogous cases. Recent federal court decisions have established that statutory beneficiaries of the relocation provisions of the Housing Act of 1949, as amended, have standing to enforce those provisions against the Secretary. **Powelton Civic Homeowners Association, et al. v. Department of Housing and Urban Development**, 284 F. Supp. 809 (E. D. Penn. 1968); **Norwalk CORE v. Norwalk Redevelopment Agency**, 395 F. 2d 902 (C. C. A. 2, 1968); **Western Addition Community Organization v. Weaver**, 294 F. Supp. 433 (N. D. Cal. 1968). This Court in **Scenic Hudson Preservation Conference v. Federal Power Commission**, 354 F. 2d 608 (C. C. A. 2, 1965), cert. den. 384 U. S. 941 (1966), allowed to stand a decision by the Court of Appeals for the Second Circuit, holding that conservationists had standing as private attorneys general to compel the Federal Power Commission to perform its administrative duties. The Sixth Circuit Court of Appeals in **Nashville I-40 Steering Committee v. Ellington**, 387 F. 2d 179 (1967), held that self-denominated community representatives who were not even property owners there had standing to challenge administrative proceedings locating a new federal-aid highway near their "community"

The decision of the lower court conflicts with the principles announced by this Court in **Flast v. Cohen**, 392 U. S. 82 (1968), regarding the requirements of standing for taxpayers to sue federal agencies on constitutional grounds.

Petitioners below consistently asserted that their standing to sue is established by these decisions and their own interest, ownership and prior activities in attempting to preserve these very buildings. The Federal District Court found as a fact and the Sixth Circuit Court of Appeals tacitly affirmed that the "area in controversy" is the 14-building West High Street Historic District and that Petitioners Kafoglis and Dennis own properties which are integral parts of the Historic District. Appendix 14. Yet both lower courts seemingly ignored these findings of fact when they held:

> It is likewise clear that none of the plaintiffs have any real interest in this litigation. None of the plaintiffs own or have owned any of the seven buildings in controversy. None of the plaintiffs had legal control or title to the buildings when they were placed on the National Register . . . They do not have a personal stake in the outcome. Appendix 56-57.

The lower courts held that Petitioners also lacked standing because they had not "sufficiently engaged in the administrative process to show a special interest in the controversy," citing cases from the Seventh Circuit and ignoring the **Scenic Hudson** decision and cases from the Second and Sixth Circuits. Appendix 57-58. The record is uncontroverted that Petitioners participated in administrative proceedings involving these particular historic buildings before local, state and federal agencies.[5]

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[5] Historic Lexington, Inc., a nonprofit historic preservation organization and a member of the class represented by Petitioners, although not a named party in this action, unsuccessfully submitted a redevelopment proposal for preserving the buildings on the 200 block of West High Street.

All these Petitioners participated in numerous meetings, formal and informal administrative proceedings before the local public agency regarding preservation of these buildings, the latest occasion being Petitioners' formal remonstrance before the local public Agency on October 14, 1969, when the agency voted to contract for demolition of the buildings on the 200 block. Appendix 35. Petitioner Harrison was personally involved in the state and federal administrative process whereby the fourteen buildings were nominated for the National Register by the National Review Committee for the Commonwealth of Kentucky, the official state nominating agency. Prior to this litigation Petitioner South Hill Neighborhood Association formally called upon the Governor of Kentucky to intercede with the HUD Regional Office in Atlanta to forestall demolition and receive his affirmative response and informal assistance. Appendix 34. Petitioner Harrison by formal complaint letter prior to this action called upon George Romney to initiate federal administrative proceedings to comply with the applicable federal statutes and was formally answered by the Secretary who declined to act. Appendix 34. After this litigation began, Petitioners called upon the State Liaison Officer for Historic Preservation to request the Advisory Council to investigate and comment on the matter and the state official responded affirmatively albeit without success. Appendix 36.

If these Petitioners lack standing in this case then it is not clear that anyone has standing to enforce the federal statutes involved here and they are but an empty form of words.

3. The lower court ruling inadequately disposes of constitutional questions relating to administrative procedures employed by local public agencies.

Grave public issues of constitutional magnitude relating to the administrative decision making procedures of local

public agencies were summarily ignored by the lower court ruling. Petitioners' Complaint fairly raising these issues and alleging the necessary underlying facts which were substantially admitted by Respondents, was dismissed without inquiry as to these points.

All fifty states, the District of Columbia and three United States Territories participate in the federal urban renewal program. They participate by means of local public agencies established under state or territorial statutes. These local public agencies administer 2,015 urban renewal projects in 965 different localities throughout the United States. The bewildering heterogeneity of structure, powers and procedures authorized under these 54 different statutes defies summarization. All are essentially similar to Respondent Urban Renewal and Community Development Agency of the City of Lexington, Kentucky, in the functions they perform. Notwithstanding their variety, local public agencies operate as local special purpose governmental agencies subject to the requirements of the Fifth and Fourteenth Amendments to the United States Constitution.

Respondent local public agency acted by means of unconstitutional procedures regarding the historic properties here involved in adopting and implementing its urban renewal plan. Specifically, the agency arbitrarily ignored information that these properties had historic significance and are now National Register properties; administrative decisions were made by the agency regarding these properties wherein some members of the agency had conflicts of interest; and, the agency made many of these administrative decisions during formal and informal private meetings.

These administrative procedures violate principles established by this Court in **Londoner v. Denver**, 210 U. S. 373 (1908); **Morgan v. United States**, 304 U. S. 1 (1937); **Ohio Bell Telephone Co. v. P. U. C.**, 301 U. S. 292 (1937);

Opp Cotton Mills v. Administrator, 312 U. S. 126 (1941); **Tumey v. Ohio**, 273 U. S. 510 (1926); **Commonwealth Coatings Corp. v. Continental Casualty Co.**, 393 U. S. 145 (1968); and see **Sniadach v. Family Finance Corp. of Bay View**, 395 U. S. 337 (1969) at 343 (Harlan J., concurring).

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted

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College of Law
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Counsel for Petitioners

Of Counsel

JOHN E. KENNEDY
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ROGER B. SLEDD
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Lexington, Kentucky 40502

Certificate of Service

I hereby certify that on this 26th day of January, 1970, copies of this Petition for Certiorari were delivered to each of the following Counsel for Respondents at their designated business addresses: Montjoy Trimble, Esq., Central Bank Building, Lexington, Kentucky, Counsel for Urban Renewal and Community Development Agency of the City of Lexington, Robert E. Featherston, Chairman,

William R. Embry, Vice-Chairman, Byron Romanowitz, Member, D. C. Noble, Member, H. J. Hagler, Member, Jennie Bryant, Director; A. Gene Oliver, Esq., Citizens Union Bank Building, Lexington, Kentucky, Counsel for Citizens Union National Bank and Trust Company, Inc.; A. B. Rouse, Esq., Counsel for J. Norwood Hodge and Norwood Construction Company, Inc.; Richard Smith, Esq., Municipal Building, Lexington, Kentucky, Counsel for The City of Lexington, Kentucky, The Board of City Commissioners of the City of Lexington, Charles Wylie, Mayor, Joseph Graves, Member of the Board, Harry Sykes, Member of the Board, Fred Fugazzi, Member of the Board, Thomas Underwood, Member of the Board; and George Cline, Esq., United States Attorney, Federal Building, Lexington, Kentucky, Counsel for George Romney, Secretary of Housing and Urban Development.

I hereby certify that on this 26th day of January, 1970, copies of this Petition for Certiorari were mailed, postage prepaid, to William D. Ruckelshaus, Esq., Assistant Attorney General, Civil Division, Room 3706, United States Department of Justice, Washington, D. C. 20530, Alan S. Rosenthal, Esq., and Alexander P. Humphrey, Jr., Esq., United States Department of Justice, Washington, D. C. 20530, Counsel for Respondent George Romney, Secretary of Housing and Urban Development, and to the Solicitor General, Department of Justice, Washington, D. C. 20530.

I further certify that all parties required to be served have been served.

Eugene F. Mooney
University of Kentucky
College of Law
Lexington, Kentucky 40506
Counsel for Petitioners

APPENDIX.

APPENDIX

Fayette Circuit Court
First Division

South Hill Association, Inc., et al.,
Plaintiffs,

vs.

Urban Renewal and Community Development Agency of the City of Lexington, et al.,
Defendants.

No. 25,992.

Judgment

This matter came on for hearing before this Court on Monday, October 20, 1969, at 2:30 P. M. in open Court on: (a) Plaintiff's Motion for a Temporary Injunction, (b) Defendants' Motions to Dismiss on various grounds, and (c) Defendants' Motions to dissolve the Temporary Restraining Order and the Amended Temporary Restraining Order previously granted herein on October 16, 1969. The Court having considered arguments of counsel, being sufficiently advised, and having entered herein it Findings of Fact and Conclusions of Law, it is ORDERED:

(1) That the Plaintiff's Complaint as amended be and the same is hereby dismissed.

(2) The Plaintiff's Motion for a Temporary Injunction be and the same is hereby overruled.

(3) That a rule issue requiring the Defendants, J. Norwood Hodge and Norwood Construction Company, to show cause why they should not be punished for contempt.

(4) The Counterclaim of certain Defendants is not dismissed and is retained on the docket for further proceedings in accordance with applicable law.

This is a final judgment insofar as the plaintiff's cause of action is concerned and there is no just reason for delay.

Entered this 21st day of October, 1969.

James Park, Jr.,
Judge, Fayette Circuit Court
First Division

To be entered, notice of entry waived:

J. Montjoy Trimble
Attorney for Defendants, Urban Renewal and Community Development Agency of the City of Lexington, a Municipal Corporation, Robert E. Featherston, Chairman; Byron Romanowitz, Member; D. C. Noble, Member; H. J. Hagler, Member; and Jennie Bryant, Acting Director of the Urban Renewal and Community Development Agency of the City of Lexington

A. Gene Oliver
Attorney for Defendant, Citizens Union National Bank and Trust Company, Inc., a Kentucky Corporation

Roger Sledd
Of Counsel for the Plaintiffs, South Hill Association, Inc., and Curtiss Harrison

Arthur B. Rouse, Jr.
Attorney for Defendants, Norwood Construction Company and J. Norwood Hodge, President of Norwood Construction Company

Fayette Circuit Court
First Division

South Hill Association, Inc., et al.,
Plaintiffs,

vs.

Urban Renewal and Community Development Agency of the City of Lexington, et al.,
Defendants.

No. 25992

Findings of Fact and Conclusions of Law

The plaintiffs in this action are Curtiss Harrison and the South Hill Neighborhood Association, Inc., a non-profit corporation composed of members interested in the preservation of certain areas in the City of Lexington. The plaintiffs have instituted this action against the Lexington Urban Renewal and Community Development Commission.

The Urban Renewal Commission has acquired certain property within the City of Lexington, including the block fronting on West High Street between Upper and Mill Streets. The Urban Renewal Commission has entered into an agreement with the defendant, Citizens Union National Bank & Trust Company, which proposes to erect a new modern bank building on the block. Pursuant to its agreement with the Citizens Union National Bank & Trust Company, the Urban Renewal Commission has entered into a contract with the defendant, Norwood Construction Company, for the demolition of all buildings on the south side of High Street between Upper and Mill Streets. The president of the Norwood Construction Company is also joined as a defendant.

The buildings to be demolished included some of the oldest buildings now standing within the City of Lexington. These buildings are of significant historical value.

Because of their historic, architectural and cultural significance, fourteen buildings located on the north side of West High Street between Limestone and Broadway (including the buildings in issue here) have been listed in the National Register of Historic Buildings established by the National Historical Preservation Act of 1966, 16 U. S. C. A., Section 470a. The National Historical Preservation Act of 1966 also creates an Advisory Council on Historic Preservation, 16 U. S. C. A., Section 470i. Under Section 106 of the National Historical Preservation Act of 1966, a federal agency must take into account any building included in the National Register which would be affected by any project involving an expenditure of federal funds. In addition, the federal agency must also afford the Advisory Council a reasonable opportunity to comment with regard to the undertaking. 16 U. S. C. A., Section 470f.

The present urban renewal plan of the Urban Renewal Commission involves the expenditure of federal funds and was also subject to approval by the Department of Housing and Urban Development (HUD). The plaintiffs assert that HUD has violated the National Historical Preservation Act of 1966 by failing to afford the Advisory Council an opportunity to comment on the destruction of the buildings in question pursuant to the defendants' urban renewal plan.

This action was commenced on October 16, 1969, at which time plaintiffs obtained a temporary restraining order for the purpose of preventing the defendants from proceeding with the demolition of the ancient buildings. The complaint alleged that the plaintiffs were filing an action against HUD and its officials in the United States District Court for the Eastern District of Kentucky for the purpose of enjoining the demolition of the buildings in question. The complaint alleged that neither of the Federal District Judges for the Eastern District of Kentucky were available, and that the defendants would accomplish

the demolition of the buildings before plaintiffs were able to secure a hearing in Federal Court. The plaintiffs sought the intervention of this court to preserve the buildings in question until the federal Court could act. There is nothing in the record in this case to indicate the pendency of any action in Federal Court. However, from statement of counsel, which was not disputed, it appears that an action was commenced in Federal Court on October 17, 1969, that a motion for a temporary restraining order was presented to Judge Swinford on October 20th, and that Judge Swinford will rule on the matter at the call of the Lexington docket on October 27th.

A hearing was held on the plaintiffs' motion for a temporary injunction on October 20, 1969. At this hearing, no oral testimony was offered. All parties submitted the issue on the affidavits in the record.

On October 14, 1969, at an evening meeting, the Urban Renewal Commission accepted the bid of the defendant Norwood Construction Company, for the demolition of the buildings in question. During the day of October 15, 1969, the Urban Renewal Commission was informed that the plaintiffs would seek to enjoin the demolition of the buildings. Norwood Construction Company commenced destruction of the buildings that evening and continued spasmodically until service of a restraining order and an amended restraining order were served the morning of October 16th. Unless restrained, the defendants will continue with the complete demolition of the buildings and thereby destroy forever whatever value they may possess.

As a citizen and taxpayer of the City of Lexington, Curtiss Harrison has standing to question whether the members of the Urban Renewal Commission are proceeding in violation of any statutory law of the state. Ky. Utilities Co. v. Ginsberg, 255 Ky. 148, 72 S. W. 2d 738; Weller v. McCauley, 383 S. W. 2d 356. While the Court has some question as to the right of the South Hill Association to

prosecute this action on behalf of its members or other citizens and taxpayers of the city, the Court need not decide this question since it does conclude that Curtiss Harrison is a proper plaintiff.

Even though the plaintiff, Harrison, has standing to prosecute this action, it does not follow that this Court can substitute its judgment for that of the Urban Renewal Commission. Whether or not these buildings should be preserved for their historic value or whether the interests of the City of Lexington can best be promoted by the erection of a new bank building, are not questions which call for a judicial decision. These decisions involve the exercise of the legislative and executive power by the Commission which is a body politic exercising governmental functions. Under our form of government which provides for the separation of powers, this Court can exercise only judicial powers. American Beauty Homes v. Louisville, 379 S. W. 2d 450. This Court cannot determine whether the demolition of the buildings is wise or folly. The Court can only consider whether the Urban Renewal Commission has exceeded its powers or has failed to follow the statutory procedure for the enactment of an urban renewal plan. Dinwiddie v. Urban Renewal & Community Development Agency, 393 S. W. 2d 872; Scenic Hudson Preservation Conf. v. Federal Power Com'n., 354 F. 2d 608, at 620; Powelton Civic Home Owners Ass'n. v. Dept. of Housing & Urban Dev., 284 F. Supp. 809, at 818-820, 829-832.

Urban renewal necessarily affects older buildings, and KRS 99.360 (1) (d) expressly authorizes the Commission to clear any and all buildings from any real property acquired by it. KRS 99.370 sets forth the prerequisites for the adoption of an urban renewal plan. Unlike the National Historical Preservation Act of 1966, the Kentucky urban renewal act does not attempt to provide for the preservation of buildings of historical interest. Nowhere in the case are any facts which could indicate that the Urban Renewal Commission is exceeding its powers or

failed to follow the statutory procedures for the acquisition and development of the land in question.

Even if HUD and the federal officials have violated Section 106 of the National Historical Preservation Act of 1966, any such violation of federal law involves only federal officials. The National Historical Preservation Act of 1966 applies only to federal agencies. The failure of HUD to afford the Advisory Council an opportunity to comment on the destruction of these buildings which appear in the National Register does not give rise to a cause of action against these local defendants.

Courts have, on occasion, exercised equity jurisdiction for the purpose of preserving the subject matter of an action pending in another court. See 42 Am. Jur. 2d, Injunctions, Section 12; 43 C. J. S., Injunctions, Section 13. While this Court does not have the benefit of the record in the federal action, it does appear that the matter is presently pending before Judge Swinford. This Court knows of no reason why Judge Swinford cannot protect the subject matter of the Federal Court action by the issuance of a restraining order or temporary injunction. Whatever necessity existed on October 16th for this Court to preserve these buildings until the matter could be brought before the proper judge in the United States District Court, that necessity no longer exists.

Therefore, it is the conclusion of the Court that the plaintiffs' motion for a temporary injunction should be denied, and that plaintiffs' complaint as amended should be dismissed for failure to state a claim upon which relief can be granted against the defendants.

There remains a counterclaim which has been filed by the defendants to which a responsive pleading is not due. In addition, there is a motion for a rule to issue against the defendants, Norwood Construction Company and Norwood Hodge, to show cause why they should not be pun-

ished for contempt for proceeding with demolition work after being served with the temporary restraining order in the case. The fact that the original restraining order described the property as being 200 West High Street rather than the 200 block of West High Street does not necessarily dispose of this issue. An injunction must not be construed literally to the point of absurdity, and compliance with the strict letter of the injunction is not enough if there is violation of its obvious spirit. Wormald v. Macy, 349 S. W. 2d 199. Therefore, the rule should issue to show cause why they should not be punished for contempt.

While these matters remain to be determined, the order dismissing the plaintiffs' complaint should, pursuant to CR 54.02, recite that there is no just reason for delaying the finality of that order.

This opinion shall constitute the Court's Findings of Fact and Conclusions of Law required by CR 65.03 (5). The Clerk will make this opinion a part of the record and the attorneys will prepare an order and judgment in conformity herewith. The temporary restraining order heretofore issued by the Court shall be dissolved upon the entry of said order and judgment.

James Park, Jr.
Judge

October 21, 1969

Copies to:

Attorney for Plaintiffs
Hon. Eugene Mooney

Attorney for Defendant
Urban Renewal Commission
Hon. Montjoy Trimble

Attorney for Defendant
Norwood Construction Company
Hon. A. B. Rouse

Court of Appeals of Kentucky

South Hill Association, Inc., and Curtis Harrison,

Appellants,

vs.

Urban Renewal and Community Development Agency of the City of Lexington et al.,

Appellees.

Order

After hearing oral argument by counsel for the Appellants and the appellees, the court is of the opinion that appellants' motion for injunctive relief under Civil Rule 65.08(1) is overruled.

Entered this October 22, 1969.

Edw. P. Hill, Jr.
Chief Justice.

Fayette Circuit Court, First Division

Urban Renewal and Community Development Agency of the City of Lexington, Ky., Plaintiff, vs. Anna Kafoglis, Defendant,	No. 22923.
Urban Renewal and Community Development Agency of the City of Lexington, Ky., Plaintiff, vs. William Thomas Dennis, et al., Defendants.	No. 22970.

Opinion

These cases have been consolidated for purposes of trial. In each case, the Urban Renewal and Community Development Agency of the City of Lexington, Ky. (hereinafter referred to as the Agency) seeks to acquire by eminent domain property situated at 315 and 317 West High Street. In each case, the defendants have challenged the right of the Agency to condemn. Pursuant to KRS 99.420(5), the issue of the Agency's right to condemn the property was heard before the Court, without a jury, on December 2, 1969. In order to understand the nature of the challenge to the Agency's right to condemn, it is necessary to set out in some detail the history of the downtown urban renewal project in Lexington.

Planning for the downtown urban renewal project was initiated in the spring of 1965. The primary immediate

objective of the project was the removal of railroad tracks through the downtown area of Lexington. See, Watkins v. Fugazzi, 394 S. W. 2d 594. As a prerequisite to its right to condemn, the Agency must satisfy the conditions set forth in KRS 99.370 for the adoption of a development plan. It has been stipulated by the parties that most of the conditions of KRS 99.370 have been satisfied. A general master plan for the Lexington community has been adopted by the City-County Planning Commission as required by Subsection 1. The Agency's development plan was approved by the City-County Planning Commission on July 2, 1965, as required by Subsection 2.

The Agency held a public hearing on the downtown urban renewal project on August 4, 1965, at which time all interested persons were afforded an opportunity to be heard on the development plan. Notice of the time and place of the hearing was published in a newspaper, as required by Subsection 3. The Agency proved that written notice of the hearing was mailed on July 23, 1965 to the owners of each parcel of land within the development area, as shown by the records in the City Assessor's Office.

It was further stipulated that the Agency had satisfied the requirements of Subsections 4 and 5 of KRS 99.370, and the Agency proved that the downtown urban renewal development plan was adopted by the Agency on August 9, 1965.

It was also stipulated that the Lexington City Commission had made the findings required by Subsection 6, and it was stipulated and proved that the City Commission approved the development plan on August 12, 1965.

The southern boundary of of the development area of the downtown urban renewal project is formed by High Street. The properties in question are located on the north side of High Street between Broadway and Mill Streets. The

buildings on the property are among the oldest in the city, and they possess historical value. At the time of the adoption of the development plan, there were other ancient buildings on the north side of High Street in the 200 block between Mill and Upper Streets and the 100 block between Upper and Limestone Streets. The development plan, as adopted in 1965, made no reference to the age of these buildings or to their historical value.

During 1966, the development plan was approved by the appropriate federal officials, and funds were committed by the federal government to the Agency for the purpose of carrying out the downtown urban renewal project. The Agency made unsuccessful efforts to acquire the properties in question. On March 12, 1968, the Agency passed a resolution authorizing the acquisition of the Dennis property at 315 West High Street by condemnation proceedings. On April 12, 1968, the Agency passed a resolution authorizing the commencement of an action to condemn the Kafoglis property at 317 West High Street. The action to condemn the Kafoglis property was filed June 21, 1968, and the action to acquire the Dennis property was filed June 27, 1968.

After the adoption of the development plan but prior to the commencement of these actions, interested persons in the community brought to the Agency's attention the fact that there were buildings of historical value within the development area. By agreement of the parties, the minutes of the Agency meetings have been made available to the Court for consideration in determining this issue. As early as February 21, 1966, the Agency was notified by members of the Blue Grass Trust for Historical Preservation of the existence of the historical structures. At a meeting of the Agency held on March 14, 1966, representatives of the Blue Grass Trust met with the Agency for the purpose of discussing the old houses. Attention was

primarily focused on the buildings in the 200 block of High Street. It should be noted that Mr. Joseph C. Graves, on behalf of the Blue Grass Trust, stated that it was unfortunate that they had not discovered sooner that the buildings had historical significance.

Subsequently, different proposals were discussed on numerous occasions by the Agency for preserving some if not all of the historical buildings on West High Street. The discussions centered on preserving the buildings in the 200 block of West High. However, consideration was also given to the properties in question in the 300 block, including a proposal that the buildings be moved to the 200 block. These discussions culminated in the first amendment to the development plan which was issued in the latter part of 1968, after the present actions had been commenced. Under the first amendment to the development plan, provision was made for a civic center in the area west of Broadway and an alternate use was provided for the 200 block of West High. The amended plan provided that the buildings in the 200 block of High Street between Mill and Upper Streets would be allowed to remain if a financially sound plan for restoration was presented to the Agency. The first amendment further provided that the properties were to be demolished if an acceptable plan for restoration was not forthcoming within two months. The first amendment made no change with respect to the properties in the 300 block which were designated by the original development plan for commercial development.

In the first half of 1969, a second amendment to the development plan was adopted. The second amendment retained historical restoration as an alternate use for the 200 block of West High, but without the two month time limitation on an acceptable plan. The primary purpose of the second amendment was to develop Main and Vine

Streets into a one-way couplet. Again, no change was made in the original designation of the 300 block of West High for commercial development.

On July 10, 1969, the old buildings located on the north side of West High Street between Broadway and Limestone Streets including the building involved in this case, were listed in the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966. The listing of these properties in the National Register was published in the Federal Register on August 5, 1969 (34 Federal Register No. 148, pages 12,722-23).

A parking lot is situated in the block bounded by Vine, Water, Mill and Upper Streets, known as Merchants Parking Lot No. 1. Among the former shareholders of the Merchants Parking Lot were Agency members William Embry and H. J. Hagler, or companies in which they had a substantial interest. The evidence established that Embry and Hagler disposed of their stock in the Merchants Parking Lot some time shortly prior to July 10, 1969. While it is not clear when they originally acquired the stock, their interest in the Merchants Parking Lot apparently antidated the adoption of the downtown urban renewal plan of 1965. In addition, Mr. Hagler has some interest in the Sleepy Head House property at 358 West Main Street, and Mr. Embry had an interest in another parking lot on East Vine Street. All of these properties were within the urban renewal area. The original development plan did not contemplate the acquisition of any of the property in which Embry and Hagler had any interest, direct or indirect. However, under the second amendment to the development plan, the Merchants Parking Lot was to be acquired, which accounts for the disposition of their stock in the company shortly before the adoption of the second amendment.

The record also shows that Agency member Byron Romanowitz received the consent of the other Agency members on September 30, 1968, for his architectural firm to bid on the design for the civic center within the development area. While his firm was not awarded the contract for architectural services on the civic center, it has rendered some services on a local basis to the out-of-town firm that was the successful bidder.

The defendants assert that the National Historical Preservation Act of 1966 prohibits the Agency from condemning 315 and 317 West High Street since these buildings are listed in the National Register for Historical Buildings. However, the Court finds no provision of the National Historical Preservation Act of 1966, or any other federal statute, which prohibits the destruction of any building listed in the National Register. In fact, the National Historical Preservation Act of 1966 implicitly recognizes that buildings listed in the National Register will be destroyed from time to time. In order that such demolition will not happen by accident without knowledge of the historical value of the building, Section 106 of the Act (16 U. S. C. A., Section 470f) provides that the head of every federal agency must afford the Advisory Council on historic preservation an opportunity to comment with regard to any undertaking involving federal funds which will affect a building listed in the National Register. The defendants make no claim based on Section 106 itself, which is clearly inapplicable, and there is no other Congressional Act throwing any cloak of protection around these buildings by reason of their listing on the National Register. Therefore, the Court concludes that the plaintiff's power to condemn is not in any way impaired by the listing of the property on the National Register.

The defendants also contend that the downtown urban renewal project development plan, as amended, does not

satisfy the requirements of a development plan under Chapter 99 which are a prerequisite to the exercise of the Agency's power to condemn. Specifically, the defendants allege that the development plan is fatally defective because it fails to reflect the historical significance of the buildings at 315 and 317 West High Street. The defendants concede that there is nothing in Chapter 99 of the Kentucky Revised Statutes specifically relating to urban renewal which provides for the preservation of historical buildings. Defendants rely on that portion of KRS 99.370(2) which provides:

> "The development plan shall designate, among other things, the location, character and extent of the public and private land ownership and uses proposed within the area, such as street, recreation, dwelling, business, industry and **such others as may be suitable.** * * *" (Emphasis added.)

While it may have been appropriate for the development plan to have reflected the historical value of the buildings, the language of the statute quoted above did not make it mandatory that the Agency include such information in its development plan. The Court concludes that the development plan, as adopted in 1965, met all of the requirements of Chapter 99 of the Kentucky Revised Statutes.

These proceedings were authorized and commenced pursuant to the original 1965 development plan and prior to the listing of the property in the National Register or either of the amendments to the development plan. If the original development plan satisfied all of the statutory requirements, it would seem to follow that the Agency's right to condemn became fixed at that point and could not be affected by subsequent events. Nevertheless, the defendants contend that the plaintiff has no right to condemn these properties because of the failure of the Agency

to amend the plan to show the historical significance of the buildings in the 300 block of West High Street.

The Court has considered the regulations promulgated by the Secretary of Housing and Urban Development (hereinafter referred to as HUD) contained in his Local Public Agency Letter 452, dated April 3, 1968, which took into account the National Historical Preservation Act of 1966. The only duty imposed by the Secretary on the local agency was the duty to inform the department of the existence of any structures on the National Register at the time the Loan and Grant Application was made. In this case, the buildings were not listed on the National Register until long after the Agency had submitted its applications and secured a commitment for the requested federal funds. The Court concludes that listing of 315 and 317 West High Street in the National Register could have no retroactive effect upon the prior agreements between the Agency, the City of Lexington and HUD.

The revised regulations in the Local Public Agency Letter 452 also provided that the development area map accompanying an application for a loan and grant should set forth buildings of historic value. In the case of buildings not listed on the National Register, this provision was intended to enable HUD to evaluate a local agency's historical restoration project. It was not intended to prohibit a development plan providing for the removal of old buildings not listed in the National Register. In the present case, the Agency did amend its original development plan to show historical preservation as an alternate use for the 200 block of West High Street. The decision of the Agency not to include the buildings in the 300 block within this proposed alternate use was a matter of administrative discretion. The Court cannot substitute its own judgment for that of the Agency in this regard.

The Agency was never under any duty to show on its development plan that these properties had any historical value. Had these buildings been listed in the National Register prior to the commencement of these proceedings, or even prior to the adoption of the two amendments to the development plan, perhaps the Agency would have been under some duty with respect to revealing to HUD the historical value of the buildings. However, when these properties were listed on the National Register in July of 1969, the Agency was under no duty to dismiss these actions nor under any duty to amend the development plan further.

Lastly, the defendants argue that they have been denied due process of law by the Agency when it determined that their property should be acquired by condemnation. First, the defendants argue that they were not afforded an opportunity to be heard in opposition to the development plan. Pursuant to KRS 99.370(3), the Agency held a public hearing on the development plan and each amendment thereto. As required by the statute, newspaper publication of the time and place of the hearings was made. In addition, notice of the hearing was mailed to the last known owner of each parcel in the development area at his last known address, as shown on the records of the City Assessor. This notice clearly satisfied all of the requirements of due process. Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865.

Defendants also argue that they were denied due process because two of the five Agency members owned an interest in property situated in the development area. They also assert that there was a conflict of interests with respect to Agency member Byron Romanowitz, but it is clear that Mr. Romanowitz did not seek employment of his architectural firm for design of the civic center until after

the decision to condemn these properties and the commencement of these proceedings. His actions subsequent to the commencement of these proceedings could not prejudice the Agency's right to condemn even if a conflict of interest existed. However, the Court finds that no conflict of interest existed merely because Mr. Romanowitz's architectural firm has rendered some services in connection with the design of the proposed civic center.

It is significant that the vote of Mr. Hagler and Mr. Embry were not necessary to the adoption of the development plan in 1965 and were not necessary to the adoption of the resolutions authorizing the acquisition of these properties by condemnation. Under the circumstances, the fact that Hagler and Embry had an interest in property within the development area is immaterial. Sims v. Bradley, 309 Ky. 626, 218 S. W. 2d 641.

KRS 99.350 provides: —

"(7) No officer or employee of the community, or of the agency, who in the course of his duties is required to participate in the formulation of plans or policies for the redevelopment of a development area, or to approve such plans or policies, shall acquire any interest in any property included within a development area within the community. If any such officer or employe owns or has financial interest, direct or indirect, in any property included within such a development area he shall immediately disclose, in writing, such interest to the agency and to the council and such disclosure shall be entered in the minutes of the agency and of the council. Failure to so disclose such interest shall constitute misconduct in office. No payment shall be made to any member or officer of an agency for any property or interest therein acquired by the agency from such member or officer unless the amount of such payment

is fixed by court order in eminent domain proceedings, or unless such payment is unanimously approved by the council."

This statute does not disqualify a person owning property within the urban development area from becoming a member of the Agency. In fact, the statute recognizes that an agency member may own property within the development area, and provides in such cases for disclosure of the facts by the agency member and the method by which the member is to be paid for any interest owned by him acquired by the agency. In this case, Hagler and Embry disclosed the fact that they owned an interest in the Merchants Parking Lot, and they disposed of any interest in the property prior to the time the lot was acquired by the Agency. The statute does not undertake to nullify the actions of the Agency, but merely makes an undisclosed conflict of interest a "misconduct in office." See, In Re Certain Parcels of Real Estate, 420 Pa. 289, 216 A. 2d 774.

KRS 99.350(7) is substantially different from KRS 80.080 involved in Norrell v. Judd, 374 S. W. 2d 192. That statute contained a direct prohibition against any housing commission employee having "any interest, direct or indirect, in any contract" with the housing commission. In Norrell v. Judd, the Court of Appeals invalidated a contract between the Frankfort Municipal Housing Commission and a cable television corporation. Pennington was an employee and officer of the housing commission and a salaried director of the cable television corporation. The Court of Appeals therefore concluded that Pennington had an interest in the contract. In this case, there is no prohibition against ownership of property in the development area by an Agency member, and the statute, in fact, recognize that the Agency member may own property within the development area. Even in the absence of the statute, the self interest of members of an administrative

body may be such as to disqualify them from acting in a particular matter. It would be a denial of due process to subject members of the public to arbitrary decisions of administrative bodies which were merely a reflection of the self-interest of the members of that body. In the present case, there is no allegation that any member of the Agency acted corruptly for his own pecuniary benefit. The narrow legal question raised by the defendants is whether the action of the Agency with respect to these properties is void by reason of the interest of two of the Agency members in other property within the development area.

A similar problem was presented to the Supreme Court of Minnesota in Lenz v. Coon Creek Watershed District, 278 Minn. 1, 153 N. W. 2d 209. In that case, a watershed improvement project was challenged on the ground that four of the five managers of the watershed district owned property within the development area. In holding that the project was valid, the Minnesota Supreme Court set forth the following standards for disqualification:

> "The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome is to insure that their decision will not be an arbitrary reflection on their own selfish interests. There is no settled general rule as to whether such an interest will disqualify an official. Each case must be decided on the basis of the particular facts present. Among the relevant factors that should be considered in making this determination are: (1) The nature of the decision being made; (2) the nature of the pecuniary interest; (3) the number of officials making the decision who are interested; (4) the need, if any, to have interested persons make the decisions; and (5) the other means available, if any, such as the opportunity for review

that serve to insure that the officials will not act arbitrarily to further their selfish interests."

Applying the same tests to the case at hand, the Court concludes that the downtown urban renewal project is not invalid by reason of the former interests of Hagler and Embry in property within the development area.

First, the decision of the Agency in this case is essentially legislative. A more stringent standard for disqualification would apply if the Agency member had been acting in a judicial or quasi-judicial capacity.

Second, the pecuniary interests of Hagler and Embry in the condemnation of these properties is remote. In order to protect the public funds, it has consistently been held in this state than an officer cannot act in a matter affecting the public when he has a direct pecuniary interest. Davis v. City of Jenkins, 238 S. W. 2d 475. Neither Hagler nor Embry, nor any company in which they had an interest would have received any funds expended by the Agency in acquiring 315 and 317 West High Street. Any benefit which they would have received would have been an indirect benefit applicable to all property in the general area, including that directly across High Street outside of the development area.

Third, Hagler and Embry are only two of the five members of the Agency. Their vote was not necessary for approval of the plan or for the decision to acquire these properties.

Fourth, there is a bona fide interest in having an urban renewal agency composed of persons having some interest in the area to be redeveloped. Otherwise, it would be difficult to obtain agency members possessing the zeal and dedication necessary to carry out a development plan. It is a fact that most administrative bodies are composed of persons interested in the subject matter to be regulated.

While the mandate has not yet issued, the Court of Appeals has recently upheld the validity of the Kentucky Milk Marketing and Antimonopoly Commission which is composed of members of the dairy industry. Whether the development area is residential or commercial in nature, the Court concludes that there is a bona fide reason for including, as Agency members, persons having some interest in the development area.

Fifth, there were sufficient opportunities for review in these cases to insure that no member of the Agency acted arbitrarily in the furtherance of any selfish interest. The downtown urban renewal project was approved only after a public hearing. The plan was then submitted to the Lexington City Commission for approval. The plan was also reviewed by HUD officials, and the defendants have obtained a review of the Agency's action by the Court in these proceedings.

Therefore, the Court concludes that Hagler and Embry were not automatically disqualified from acting merely because of their interests in property within the development area. This ruling would not have barred consideration of an allegation that their actions were arbitrary in this particular case because they acted pursuant to their self-interest. However, there is no such allegation.

The defendants also object to the fact that regular meetings of the Agency were conducted without notice to the general public or specific persons affected. However, the defendants also concede that the only statute requiring public notice is KRS 99.370(3). The Court has heretofore found that the statutory notice was in fact given with respect to the public hearing on the development plan, and there is no merit to this contention.

The last contention of the defendants is that they were denied due process because the Agency refused to con-

sider evidence of the historic significance of these properties. It is true that the Agency did not consider the historical value of these buildings prior to the adoption of the original plan. However, it is also true that the historical significance of the buildings in question was not brought to the attention of the Agency at the public hearing on the development plan or at any other time prior to the adoption of the plan. The defendants were not denied due process when they themselves failed to call the Agency's attention to any historical value possessed by the buildings prior to the adoption of the original plan.

The defendants also contend that the Agency never gave any consideration to the historical value of the buildings subsequent to the original adoption of the plan in 1965. This is not correct. The records of the Agency clearly reflect that consideration was given to the historical value of 315 and 317 West High Street. The Court cannot say, as a matter of law, that the Agency's decision to retain the original commercial use for the property was arbitrary or capricious.

The Court concludes that the plaintiff has the right to condemn these properties. This opinion will constitute the Findings of Fact and Conclusions of Law of the Court. The Clerk will make this opinion a part of the record and the attorneys will prepare an order in conformity herewith.

James Park, Jr.
Judge.

December 24, 1969

Fayette Circuit Court
Third Division

Jan. 9—1970

Urban Renewal and Community Development Agency of the City of Lexington, Kentucky,
Plaintiff,

vs.

William Thomas Dennis and Beatrice Tindall Dennis, His Wife, and Lexington Theological Seminary, a Kentucky Corporation,
Defendants.

No. 22,970.

Order

This cause having come on for hearing, and the Court being advised, It Is Hereby Ordered and Adjudged that the Plaintiff herein may condemn the within property for the purposes set out in Chapter 99 of the Kentucky Revised Statutes.

/s/ James Park, Jr.
Judge

A Copy.

Attest:

Katherine M. Laden, Clerk
Fayette Circuit Court

Fayette Circuit Court
Third Division

Jan. 9—1970

Urban Renewal and Community Development Agency of the City of Lexington, Kentucky,
Plaintiff,

vs.

Anna Kafoglis,
Defendant.

No. 22,923.

Order

This cause having come on for hearing, and the Court being advised, It Is Hereby Ordered and Adjudged that the Plaintiff herein may condemn the within property for the purposes set out in Chapter 99 of the Kentucky Revised Statutes.

/s/ James Park, Jr.
Judge

A Copy.

Attest:

Katherine M. Laden, Clerk
Fayette Circuit Court

United States District Court for the
Eastern District of Kentucky
(Lexington)

(Filed 10-28-69)

South Hill Neighborhood Association, Inc., a Nonprofit Incorporated Association of the Commonwealth of Kentucky; The Bluegrass Trust for Historic Preservation, Inc., a Nonprofit Incorporated Association of the Commonwealth of Kentucky; Curtis Harrison; Mrs. Stathis Kafoglis; Mr. and Mrs. W. T. Dennis; on Behalf of Themselves and All Other United States or Kentucky Citizens, Taxpayers, Property Owners, or Historic Preservation Groups and Persons Similarly Situated,

Plaintiffs,

vs.

George Romney, Secretary of the United States Department of Housing and Urban Development,
The City of Lexington, Kentucky; Honorable Charles Wylie, Mayor of the City of Lexington; The Board of City Commissioners of the City of Lexington; Joseph Graves, Member of the Board; Harry Sykes, Member of the Board; Thomas Underwood, Member of the Board; Fred Fugazzi, Member of the Board; Urban Renewal and Community Development Agency of the City of Lexington, a Municipal Corporation; Robert E. Featherston, Chairman; William R. Embry, Vice-Chairman; Byron Romanowitz, Member; D. C. Noble, Member; H. J. Hagler, Member; Jennie Bryant, Director of the Urban Renewal and Community Development Agency of the City of Lexington,
Citizens Union National Bank and Trust Company, Inc., a Kentucky Corporation; Norwood Construction Company, Inc., a Kentucky Corporation; J. Norwood Hodge, President of Norwood Construction Company,

Defendants.

Civil Action No. 2080.

Amended Complaint

JURISDICTION

1. The action arises under the Fifth and Fourteenth Amendments to the Constitution of the United States; under Title 28, U. S. C., §§ 1331(a), 1361, 1651, 2201, 2202; The Administrative Procedure Act, Title 5, U. S. C., §§ 701, 702, 703, 704, 705; Title I of the Housing Act of 1949, as amended, Title 42, U. S. C., §§ 1441 *et seq.*, more particularly, 42 U. S. C., §§ 1451, 1456(h), 1457, 1460(c), 1460(c)(4), (6), (9), and (10), 1460(d)(2), 3535(d), and regulations adopted pursuant thereto; and under the National Historical Preservation Act of 1966, Public Law 89-665, 80 Stat. 915 (1966), 16 U. S. C., §§ 470-470m, more particularly, Section 106 of the Act, 16 U. S. C., § 470f,

as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interests and costs, the sum of ten thousand dollars.

PLAINTIFFS

2. South Hill Neighborhood Association, Inc., is a non-profit membership association incorporated under Kentucky Revised Statutes, Ch. 273, with offices in Lexington, Kentucky. The Plaintiff association has several hundred members, over fifty percent (50%) of whom live and own property in the neighborhood bounded by High Street and Maxwell Streets in the City of Lexington.

3. The Blue Grass Trust for Historic Preservation, Inc., is a non-profit association incorporated under Kentucky law, with its principal office in Lexington, Kentucky, which has as its central purpose historic preservation.

4. Curtis Harrison resides at and owns the property located at 341 Madison Place, Lexington, Kentucky, which property is located within a few blocks of the National Historic District designated on West High Street. Curtis Harrison is the President of the South Hill Neighborhood Association, Inc., is a United States and Kentucky citizen, is a federal, state and local taxpayer, and is a member of several Kentucky historic preservation groups, among which are Citizens for Historic Lexington, The Bluegrass Trust for Historic Preservation, and Historic Lexington, Inc.

5. Plaintiff Mrs. Stathis Kofoglis, is a widow and is the owner of the property designated as 317 West High Street, which property is located within the area designated as a National Historic District on the National Register of Historic Places, and which property is also located within the boundaries of the tract of land described and set forth in the plans for the City of Lexington Urban Renewal Project. Mrs. Kafoglis is a United

States and Kentucky citizen, and a federal, state and local taxpayer.

6. Mr. and Mrs. W. T. Dennis are the owners in fee simple absolute of the property designated as 315 West High Street, which property is located within the area designated as a National Historic District on the National Register of Historic Places, and which property is also located within the boundaries of the Lexington Urban Renewal Project.

7. The named Plaintiffs are representative parties and bring this action under FRCP 23 on behalf of themselves, and on behalf of all other citizens of the United States, all other citizens of the Commonwealth of Kentucky, all other federal, state and local taxpayers, all other property owners in the City of Lexington, and all other public or private groups and individuals interested in historic preservation, similarly situated. The class as so described is so numerous that joinder of all members is impracticable; there are questions of fact or law common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; the parties defendant opposing the class have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

DEFENDANTS

8. The federal defendant George Romney is the Secretary of the Department of Housing and Urban Development of the United States who administers the Housing Act of 1949 as amended, including the federal urban renewal program.

9. The local defendants are the Mayor and the Board of City Commissioners of the City of Lexington, and the Urban Renewal and Community Development Agency of the City of Lexington (hereinafter referred to as the Agency) a municipal corporation, existing under and pursuant to KRS Chapter 100, and acting under KRS 99.330, *et seq.* and City of Lexington Ordinances adopted thereunder, which agency functions as a local development agency under the Housing Act of 1949, as amended, and which has promulgated and administers the Lexington Urban Renewal Plan pursuant to which the buildings located on the 200 block of West High Street in Lexington, Kentucky, are to be demolished. Individual local defendants Robert E. Featherston is Chairman of the Agency; William R. Embry is Vice-Chairman; Byron Romanowitz, D. C. Noble and H. J. Hagler are the members of the Agency and individual defendant Jennie Bryant is the Director of the Agency.

10. Private defendant Citizens Union National Bank and Trust Company of Lexington, Kentucky (hereinafter referred to as the Bank) is acting under a land disposal agreement and deed as a redeveloper of the land located in the 200 block of West High Street in Lexington, Kentucky, under and pursuant to the Housing Act of 1949, as amended, and the Lexington Urban Renewal Plan. Private defendant Norwood Construction Company, Lexington, Kentucky, a Kentucky corporation, is the successful bidder who has been awarded a contract by the Agency immediately to demolish and raze the buildings located on the 200 block of West High Street. Individual defendant J. Norwood Hodge is president of Norwood Construction Company and directly supervises and directs its bulldozer operations.

FACTS

11. Located on the south one-half of the 100, 200 and 300 blocks of the North Side of West High Street in Lexington, Kentucky, are fourteen buildings which because of their age, uniqueness, and history are and for many years have been of outstanding historic, architectural, and cultural significance to the city, state and region. The buildings were accepted by the Keeper of the National Registry for Historic Places and listed as the West High Street Historic District on the National Register on July 10, 1969. Official noice thereof was published in the Federal Register on August 5, 1969. The particular West High Street buildings which are located in and integral parts of the Historic District are: 125, 129, 133, 201, 211, 215, 221, 225, 229, 233, the Asbury Methodist Episcopal Church at the corner of West High Street and Mill Street, 303-305, 315, 317 and 319. Seven of the fourteen buildings are located on the South one-half of the North Side of West High Street in the 200 block and are the specific buildings in controversy here.

12. The Urban Renewal and Community Development Agency of the City of Lexington, Kentucky (Agency), promulgated its Urban Renewal Area Project Ky. R-63 in December 1965 providing for redevelopment of a twenty acre section of the downtown portion of the city including the 100, 200 and 300 blocks on the North side of West High Street. The Secretary of Housing and Urban Development (HUD) approved the plan and authorized federal funding of the Project under a Loan and Capital Grant Contract dated June 7, 1966, under which the Agency has received and expended, currently holds and will be entitled to receive and expend federal funds in the future in the implementation of the Project. The original Project failed to note the presence and sig-

nificance of certain known historical buildings located on the above-cited blocks. The Project was amended by the Agency in July 1968 so as to provide for location on the 200 block of West High Street a proposed Civic Center but again the Project plan failed to note the existence or significance of the historical buildings on that site although such information was called to its attention in formal meetings and otherwise. The Agency again amended its Project plan in January 1969 and provided for relocation of the Civic Center to another site and redesignation of the redevelopment use of the South one-half of the 200 block on West High Street for commercial development or the alternative for historical preservation.

13. The Agency acquired seven of the historic buildings all located on the South one-half of the 200 block of West High Street by February 1969 for approximately $131,000 and in May 1969 promulgated its Land Disposal Plan under which the parcels were to be advertised and sold as consolidated to redevelopers which plan HUD approved. The historic sites and other parcels on the 200 block of West High Street were publicly advertised for sale by Invitation for Proposals on Block 5 Parcel 3 published on May 9, 1969, and the competitive proposals were to be opened before the Agency on June 10, 1969. The Bank submitted a proposal whereby it would acquire the land and, utilizing substantially the entire block, construct thereon a multi-story commercial building. A Proposal that the Agency and City restore the buildings was submitted by a historic preservation group. The Agency and the Bank executed a Contract for Sale of Land for Private Redevelopment on July 9, 1969, selling Block 5 Parcel 3 to the Bank but requiring the Agency to clear the land. Thereafter, on July 10, 1969, the two proposals were formally opened before the Agency. By a formal vote taken on July 18, 1969, the Agency accepted

the proposal submitted by the Bank. This action HUD approved on July 29, 1969. The Agency delivered its deed conveying the land to the Bank on October 1, 1969. The Agency advertised for demolition bids on the land and accepted the bid of Norwood Construction Company on October 14, 1969, and on October 15, 1969, the parties executed a demolition contract which HUD approved on October 20, 1969. The Agency on October 15, 1969, instructed the Contractor to destroy the buildings immediately. Upon completion of demolition the Contractor will be entitled to be paid $6,428.00 from Agency funds. All these proceedings and actions described in Paragraph 4(b) were undertaken by the Defendants without complying with the provisions of Section 106 of the National Historic Preservation Act of 1966, P. L. 89-665 or with the 1966 Amendments to the Housing Act of 1949.

14. Plaintiff is informed and believes and therefore alleges that the Defendants well knew of the existence and significance of the historic buildings when the Project plan was first submitted and approved in 1966, amended in 1968 and in 1969, and at the time the proposal by the Bank was accepted, and was on actual and official notice of the existence of the registered Historic District before the demolition bid was accepted and approved, yet throughout they failed and refused sufficiently to describe or note the significance of the historic buildings and Historic District on the appropriate Project documents and maps or to file accurate and complete updated documents and maps noting the existence of the Historic District, and in divers ways affirmatively concealed from the public the fact that a Historic District containing registered buildings would be destroyed by the proposed redevelopment of the 200 block of West High Street by a private redeveloper. Specifically, during the period from December 1965 through October 14, 1969, these Plaintiffs and the public were led to believe by the Agency, its

members and Director, that the historic buildings would not be demolished but instead would be restored on their sites or moved to another location and restored and this impression was effectuated by means of Agency meetings held without public notice and informal, special and call meetings at which actions relating to the destruction of the historic buildings were taken without public participation. The second amendment to the Project plan stated the buildings would be preserved on their sites and the Agency resolution accepting the Bank's proposal expressly provided for moving the buildings to another location for restoration. Further, Plaintiff is informed and believes and therefore alleges that selection of the redevelopment proposal of the Bank was accomplished by the Agency in an arbitrary, capricious and biased proceeding.

15. Plaintiff made oral complaint of the proposed destruction of the Historic District to the Atlanta Regional Director of HUD on October 8, 1969, who failed and refused to act. By formal written complaint letter on October 9, 1969, Plaintiff informed the Secretary of the facts and called upon him to act to forestall acceptance of the demolition bids, withdraw his approval of the Project plan regarding the lands herein and to refer the matter to the Advisory Council on Historic Preservation under the National Historic Preservation Act of 1966. The Secretary failed and refused to act. Plaintiffs and other members of the class appeared before the Agency at its meeting on October 14, 1969, where they stated the facts concerning the Historic District and remonstrated and called upon the Agency to delay taking action on the demolition bids, correct their Project plan and refer the matter to HUD for comment by the Advisory Council under the National Historic Preservation Act of 1966. The Agency declined so to act and accepted the

bid of the Contractor, ordering immediate demolition of the buildings.

16. At its meeting on October 14, 1969, upon the request of Plaintiff—the Agency agreed and directed its Director, Jennie Bryant, to notify these Plaintiffs prior to commencement of demolition and on October 15, 1969, the attorney for the Agency was informed of Plaintiff's preparation of this action and intent to file it promptly and in response to query informed these Plaintiffs that the demolition contract had not been formally executed at that time and demolition would likely not commence prior to October 17, 1969. Plaintiff is informed and believes and therefore alleges that at approximately 6:00 p. m. on October 15, 1969, defendant Jennie Bryant hand carried the demolition contract to the residence of defendant J. Norwood Hodge where he executed it and gave orders to his corporate agents to proceed with demolition that night despite the fact no demolition permit for destruction of the buildings had been obtained from the City of Lexington. At approximately 9:00 p. m., October 15, 1969, the bulldozers of defendant Norwood Construction Company began demolition of the building located at 215 West High Street, which is listed on the National Register. Demolition was halted at approximately 9:45 p. m. that night upon the request of the Lexington City Manager. The next morning on October 16, 1969, at 8:30 a. m. demolition was resumed and at the same time Plaintiff filed an action against the local and private Defendants in the Circuit Court of Fayette County and obtained a temporary restraining order against them which was served on Defendant J. Norwood Hodge at the demolition site at approximately 10:45 a. m., October 16, 1969, but not before one Registered building was substantially destroyed and two other buildings in the Historic District damaged, one irreparably. The Fayette Circuit Court restraining order was dissolved upon the institution of this action.

17. The State Liaison Officer for Historic Preservation on October 20, 1969, requested the Advisory Council for Historic Preservation to investigate, consider and comment to HUD and the Agency concerning the matter herein, and to make recommendations for preserving the historical significance of the West High Street area. The Advisory Council has not yet acted.

18. Unless the private and local Defendants are temporarily enjoined and restrained from the commission of the acts threatened by them as above set forth and the federal and local Defendants be ordered to perform their duties under federal law the Plaintiffs will suffer great and irreparable damage, in that unique buildings registered on the National Register of Historic Buildings will be destroyed by the illegal acts of the Defendants and their federal claim rendered moot.

19. The Defendants and the public will not suffer loss caused by delay in demolition of the buildings above described.

FIRST CLAIM FOR RELIEF

Plaintiff joins as parties defendant for purposes of obtaining specific relief under its First Claim for Relief the Secretary of Housing and Urban Development and joins the remaining named defendants in aid of the jurisdiction of the Court under 28 U. S. C. 1651, and in order that they may be heard on these issues. Paragraphs 1-19 of this complaint are incorporated by reference into this First Claim for Relief.

First Count

The Secretary of HUD violated the provisions of Section 106 of the National Historic Preservation Act of 1966 in that he approved the contract for Disposition of Land to Private Redeveloper and the Demolition Contract en-

tailing destruction of the Historic District after being put on notice by the Agency's Second Amendatory Project Report, the Federal Register and Plaintiff's complaint letter that the buildings were listed as a Historic District on the National Register of Historic Places, and thereby approved expenditure of federal funds without taking into account the effect of Project Ky. R-63 on said Historic District.

Second Count

The Secretary of Housing and Urban Development has violated the provisions of the National Historic Preservation Act of 1966 by his approval of the Urban Renewal Project and amendments thereto and Land Disposal Agreement executed by and between the Agency and the Bank without complying with the provisions of Section 106 of the National Historic Preservation Act of 1966 in that he failed to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the impending effect of a federally-assisted urban renewal undertaking upon historic buildings listed on the National Register; and he will continue and compound said violation by failing and refusing to withdraw his approval and to withhold, recover or restrict federal funds previously authorized or disbursed by him to the Agency which will be used to demolish and raze the buildings in controversy.

Third Count

The Secretary of Housing and Urban Development has violated the Housing Act of 1949, and the regulations promulgated thereunder, and, specifically, 42 U. S. C. 1460(c)(4) by approving the Project Ky. R-63 and amendments thereof and the land disposal agreement by and between the Agency and the Bank wherein the lands in controversy will be acquired by a private redeveloper for

a sale price equal to approximately fifty percent (50%) of the fair market value of the land in violation of 42 U. S. C., § 1460(c)(4) and Part 14, ch. 1, § 1, p. 1 (7-12-62), Urban Renewal Manual, Policies and Requirements for Local Public Agencies, U. S. Housing and Home Finance Agency, Urban Renewal Administration.

Fourth Count

The Secretary of HUD has violated the Housing Act of 1949, as amended, by approving the land disposal plan of the Agency which plan adopted an unauthorized method of disposal of property acquired by the Agency to wit: the setting of a pre-determined fixed price for property below fair market value against which both private commercial developers and public and quasi-public developers were to submit competitive land-use plans and bids. The said method of property disposal is not authorized by the Housing Act of 1949, as amended, and is in direct contravention of the express policy of the Act, as expressed in 42 U. S. C., § 1457 and numerous other sections of the Act and regulations to allow disposition of property below fair market value only in the case of developments for public housing or low income housing.

Fifth Count

The Secretary of HUD violated 42 U. S. C., § 1460(b)(c) and 42 U. S. C., § 1451(c) and 42 U. S. C., § 1460(8)(10) by failing to require the Agency to submit and to update an urban renewal plan embodying a workable program for community improvement which is of sufficient scope and content to furnish a basis for evaluation of need for the destruction of the Historic District and which is and remains sufficiently complete to indicate, historic and architectural preservation within the urban renewal area encompassing West High Street and by failing to determine prior to giving his approval that the

objectives of the urban renewal plan could not be achieved through rehabilitation of the south one-half of the 200 block on West High Street under the second Amendatory Project Report. Specifically, the Secretary failed to require the Agency to complete its plan at the time of its last amendment in February 1969 regarding utilization of the south one-half of the north side of West High Street and at the time HUD was asked to approve the acceptance by the Agency of the proposal submitted by the Bank on July 18, 1969, or at the time HUD was asked to approve acceptance of the demolition contract bid by Norwood Construction Company on October 14, 1969.

SECOND CLAIM FOR RELIEF

For the purpose of stating the Second Claim for Relief, Plaintiff joins all the defendants to this action, i. e., federal, local, and private defendants and asserts the claim for relief against all of them as arising under the Constitution and laws of the United States and the Commonwealth of Kentucky. Paragraphs 1-19 are hereby incorporated by reference.

First Count

The federal and local defendants violated their federal and state duties under the applicable statutes and the regulations adopted pursuant thereto by failing to comply with the provisions of section 106 of the National Historic Preservation Act of 1966 and the 1966 Amendments to the Housing Act of 1949; by failing to update sufficiently and to supply timely Project plan information concerning the Project to the public and to the federal defendants concerning the historic nature of the buildings in controversy as required by 42 U. S. C., § 1456(h); and by failing to require and develop criteria and conditions which would require or encourage rehabilitation, restoration or preservation of the buildings as required by 42

U. S. C., § 1460(c); and by adopting land disposal methods not authorized by law and disposing of the land in an illegal manner under Urban Renewal Manual 14-1-1 (7-12-62) and KRS 99.350(7) and 99.360; and regarding all such undertakings acted arbitrarily and capriciously in violation of plaintiff's rights under the Fifth and Fourteenth Amendments to the United State: Constitution.

Second Count

The defendants have violated Plaintiff's rights under the above-cited sections by entering into and performing contracts which require the destruction of the buildings, under circumstances in which the defendants had constructive and, in the alternative, actual knowledge that the contracts were being executed in violation of state and federal law. The private defendants have acted and propose and continue to act as agents for the local and federal defendants in completing the land disposal and demolition undertaking herein thereby destroying the jurisdiction of this Court and rendering Plaintiff's federal claims herein moot unless restrained.

Third Count

The federal and local defendants violated Plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution by failing to promulgate the requisite rules, regulations, guidelines, by-laws, or contract provisions, covenants or conditions pursuant to their respective authority under the Housing Act of 1949, as amended, § 1456(7) and KRS 99.360(b), establishing procedures regarding the conduct of administrative proceedings under these statutes which will satisfy the requirements of administrative due process under the Fifth and Fourteenth Amendments to the United States Constitution; specifically, the Agency amended its bylaws at a meeting without notice to authorize future meetings with-

out notice to the public and thereafter conducted informal special and regular meetings without notice at which administrative decisions were made and formal action taken regarding matters bearing on destruction of the historic buildings here in controversy.

Fourth Count

The local Defendants violated Plaintiffs' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution by making administrative decisions regarding the urban renewal plan and amendments, the land disposal method and contracts and the demolition contract without sufficient evidence and as a biased panel and without giving these Plaintiffs and the public a reasonable opportunity to be heard for the reason that meetings relating to the matters in controversy were held without notice to these Plaintiffs and the public in violation of Urban Renewal Manual, Policies and Requirements for Local Public Agencies, Ch. 1, § 1 (7-12-62); and decisions were made regarding demolition without knowledge of or without considering information necessary to an objective and informed decision; and that some members of the Agency who had or anticipated having private financial interests in property located in the urban development area under KRS 99.350(7) may have acted with bias of personal interest which tended directly or indirectly to substantially affect the outcome of the administrative decision being made.

RELIEF

WHEREFORE: The Plaintiffs demand:

That the Court issue a preliminary injunction and a permanent injunction without bond against the federal defendants enjoining them to take all necessary steps, including withdrawal of prior approval of the Lexington

Urban Renewal Project Ky. R-63 as amended or parts thereof and withholding of federal funds from the Project in order to prevent the demolition, removal or other destruction of the fourteen historic buildings located in 100, 200, 300 blocks on West High Street, Lexington, Kentucky, until such time as the Court shall later determine that they have complied with federal law.

That the Court issue a preliminary injunction and permanent injunction without bond restraining the federal and local defendants from taking any steps to demolish or remove the buildings in controversy, and ordering the local defendants to take whatever affirmative steps are necessary and within their power to prevent the private defendants from carrying out the same acts.

That the Court issue a preliminary injunction and permanent injunction restraining the private defendants from demolishing, destroying or removing the buildings in controversy.

That the Court declare the rights of the parties and reform or set aside the contracts, deeds and agreements between the federal and local defendants and the private defendants relating to the destruction of the Historic District on West High Street; that the Court order the defendants to reconstruct and repair the registered buildings previously demolished or damaged; that the Court order the federal defendant to refer the matter to the Advisory Council on Historic Preservation for comment and for recommendations regarding continuing protection and preservation of the Historic District; and

That the Court declare that the Plaintiffs have rights arising under the National Historic Preservation Act and the National Housing Act as amended in 1966, and that the Court issue a mandamus against the Secretary of Housing and Urban Development ordering him to do his duties under those Acts,

That the Court grant judicial review of the Agency action taken by the United States Department of Housing and Urban Development and the Urban Renewal and Community Development Agency of Lexington, undertaking to demolish buildings registered on the National Register of Historic Places,

That the Court grant all other appropriate relief to which the Plaintiffs may be entitled.

Roger B. Sledd
1404 First Security National Bank Building
Lexington, Kentucky
Attorney for the Plaintiffs

CERTIFICATE OF SERVICE

I, Roger B. Sledd, attorney for the plaintiffs in the above entitled action, hereby certify that on the 28th day of October, 1969, I served the attached Amended Complaint and Motion for Preliminary Injunction upon: the attorneys for the defendants:

Mr. Montjoy Trimble
Kincaid, Wilson, Schaeffer, Trimble & Hembree
500 Central Bank Building
Lexington, Kentucky

Mr. A. Gene Oliver
Strother, Oliver & Strother
Citizens Union Bank Building
Lexington, Kentucky

Mr. Richard Smith
Acting City Manager and Corporation Counsel
City Manager's Office
Municipal Building
Lexington, Kentucky

Mr. George Cline
United States District Attorney for
the Eastern District of Kentucky
Federal Post Office Building
Lexington, Kentucky

by leaving copies at their offices above designated with their clerks or other person in charge thereof; and on October 28, 1969 by depositing a copy in the United States mails, air mail postpaid addressed to George Romney, Secretary, United States Department of Housing and Urban Development, 451 Seventh Street, S. W., Washington, D. C. 20410.

Roger B. Sledd
1404 First Security National Bank
Building
Lexington, Kentucky
Attorney for the Plaintiffs

United States District Court, Eastern District of Kentucky, Lexington

South Hill Neighborhood Association, Inc., et al., Plaintiffs,
vs.
George Romney, et al., Defendants.
Civil No. 2080.

Restraining Order

(Filed Oct. 23, 1969)

At 4:40 P. M. on October 22, 1969, at Covington, came the plaintiffs by their attorneys Robert Lawson and John E. Kennedy; the defendant Urban Renewal and Commu-

nity Development Agency of the City of Lexington by its attorney Montjoy Trimble and the City of Lexington Corporation Counsel, Richard S. Smith; the defendants Norwood Construction Company and J. Norwood Hodge, by their attorney, Arthur B. Rouse; the defendants Robert E. Featherston, Byron Romanowitz, D. C. Noble, and Jumie Bryant, by their attorney Montjoy Trimble. The defendants George Romney, Secretary of Housing and Urban Development and Citizens Union National Bank and Trust Company, Inc. were not represented by counsel.

A "Supplementary Affidavit in Support of Motion for Temporary Restraining Order" was filed by the plaintiffs and Mr. Trimble filed a certified copy of the original record in Fayette Circuit Court in Case No. 25992, as Exhibit 1 for the defendants.

The Court heard counsel for the plaintiffs, Mr. Trimble, Mr. Rouse and Mr. Smith for the defendants and being advised Ordered that the plaintiffs' "Motion for Temporary Restraining Order" be and it is sustained.

It appearing to the Court from the record and statements of counsel that demolition of the fourteen (14) buildings in controversy by the defendants and/or their agents would render this action substantially moot, it was Adjudged:

1. The defendants and each of them are hereby restrained from doing further damage to or in engaging in demolition of any of the fourteen (14) buildings listed on the National Historical Register, located on the 100, 200 and 300 blocks of West High Street in the City of Lexington, Kentucky, until the expiration or dissolution of this Restraining Order.

2. This Restraining Order was issued at 6:30 P. M. on Wednesday, October 22, 1969 and shall remain in full force and effect until the conclusion of a hearing on the

plaintiffs' Motion for a Temporary Injunction which is hereby assigned for hearing at 1:00 P. M. in the United States District Court Room at Lexington on Friday, October 31, 1969.

3. The plaintiffs shall execute a bond in the sum of Five Thousand ($5,000.00) Dollars with good and sufficient surety indemnifying the defendants and each of them for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Briefs in support of the respective positions of the plaintiffs and defendants shall be filed on or before Tuesday, October 28, 1969. Reply briefs may be filed on Wednesday, October 29, 1969.

Mac Swinford
Judge

October 23, 1969

United States District Court
Eastern District of Kentucky
Lexington

South Hill Neighborhood Association, Inc., et al.,
Plaintiffs,
v.
George Romney, et al.,
Defendants.
No. 2080.

Order

(Filed 11-14-69)

It is the Judgment of this court and is hereby ordered that:

(1) the Temporary Restraining Order heretofore issued by this court be dissolved upon entry of this Order;

(2) the plaintiffs' Motion for a Temporary Injunction is overruled; and

(3) the defendants' motions to dismiss be sustained and the Complaint as amended be dismissed.

See memorandum.

Mac Swinford, Judge

United States District Court
Eastern District of Kentucky
Lexington

South Hill Neighborhood Association, Inc., et al.,
Plaintiffs,
v.
George Romney, et al.,
Defendants.
No. 2080.

Memorandum

(Filed 11-14-69)

Plaintiffs in this action allege that George Romney, Secretary of United States Department of Housing and Urban Development, failed to notify the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. 16 U. S. C. 470.

This case is before the court on plaintiffs' motion for a temporary injunction and defendants' motions to dismiss the complaint. A full disclosure and discussion of the parties and facts which led to this controversy are imperative to a ruling on these motions.

The parties to this action include: Plaintiffs (1) South Hill Neighborhood Association, Inc. (South Hill), a non-profit Kentucky corporation having as one of its purposes the preservation of historical buildings; (2) The Bluegrass Trust for Historic Preservation, Inc. (Bluegrass Trust), a non-profit Kentucky corporation having as one of its purposes the preservation of historical buildings; (3) Curtis Harrison, a citizen, taxpayer and President of South Hill; (4) Mrs. Stathis Kafoglis, a citizen, taxpayer and owner of property within the area in controversy; (5) Mr. and Mrs. W. T. Dennis, citizens, taxpayers and owners of property within the area in controversy; and Defendants (1) George Romney, Secretary of the United States Department of Housing and Urban Development (HUD); (2) The City of Lexington, Kentucky, a municipal corporation, duly organized and existing under the laws of the Commonwealth of Kentucky; (3) Honorable Charles Wylie, Mayor of Lexington, Kentucky; (4) The Board of City Commissioners of the City of Lexington, authorized city board for the City of Lexington; (5) Joseph Graves, Harry Sykes, Thomas Fugazzi, duly elected and qualified members of the Lexington Board of City Commissioners; (6) Urban Renewal and Community Development Agency of the City of Lexington (Lexington Urban Renewal Agency), a municipal corporation organized under and existing by virtue of the laws of the Commonwealth of Kentucky; (7) Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble and H. J. Hagler, duly appointed, qualified and acting members of the Lexington Urban Renewal Agency; (8) Jennie Bryant, director of the Lexington Urban Renewal Agency; (9) Citizens Union National Bank and Trust Company, Inc. (Citizens Union Bank), a national banking corporation organized under and existing by virtue of the laws of the United States of America; (10) Norwood Construction Company, Inc. (Norwood Construction Co.), a Ken-

tucky corporation; and (11) J. Norwood Hodge, President of Norwood Construction Co.

The facts out of which this controversy arises are as follows. The Lexington Urban Renewal Agency was formed in 1959 and has continued in existence to date. On April 1, 1965, the Board of City Commissioners of the City of Lexington adopted an ordinance describing area in downtown Lexington to be appropriate for an urban renewal project. An urban renewal plan was promulgated for this area and said plan was approved by the Planning and Zoning Commission of Lexington-Fayette County at a public hearing on July 22, 1965. Notice of this plan was given to each property owner in the area bounded on the north by Main Street, on the west by Patterson Street, on the south by High Street, and on the east by Shreve Avenue. This includes the area in controversy. The method of financing costs for this project was authorized by the Kentucky Court of Appeals on October 1, 1965. See Watkins v. Fugazzi, 394 S. W. 2d 594 (Ky. 1965).

The Lexington Urban Renewal Agency's plan, Ky. R-63 was submitted to the federal authorities on December 30, 1965. On June 7, 1966, HUD approved the December, 1965, plan and authorized federal funding under a Loan and Capital Grant Contract. This plan provided that all land in the project area would be used for commercial purposes and that all land acquired would be cleared of all improvements. On October 19, 1967, the City of Lexington sold $3,500,000.00 of revenue bonds to finance its portion of the cost of the urban renewal project.

On July 22, 1968, the plan for the Lexington urban renewal project, R-63, was amended. This amendment to the 1965 plan provided for a Civic Center in an area bounded by Main, Patterson, High and Broadway Streets,

and provided for an alternative use of historic preservation in the north half of the 200 block of West High Street. Seven of the buildings involved in this action are in the area with historic preservation designated as an alternate use. Any plan submitted for historic preservation was to meet standards which were explained at public meetings. If the buildings were not restored, they were to be demolished. HUD approved this first amendment on October 18, 1968.

In January, 1969, the urban renewal plan, Ky. R-63, was again amended by Lexington Urban Renewal Agency. This amendment provided for an increased expenditure of federal funds, a change in alignment of streets in the area. This amendment retained, however, the alternative use for historic preservation as contained in the July, 1968, plan and amendment. HUD approved this second amendment on May 8, 1969.

On May 9, 1969, and June 29, 1969, public advertisements appeared in newspapers inviting competitive proposals to be submitted for part of the land contained in the urban renewal plan, R-63. These proposals were formally opened before the Lexington Urban Renewal Agency on July 10, 1969. Two proposals were submitted at this time. One was from Citizens Union Bank and proposed construction of a $4,000,000.00 to $8,000,000.00 multi-story bank and office building which would ultimately employ one thousand persons. This proposal was determined by the Lexington Urban Renewal Agency to comply with their requirements. The other proposal came from Historic Lexington, Inc. (not a party to this action but of a class which plaintiffs purport to represent). Historic Lexington, Inc.'s proposal was for restoration of the buildings in this area. This proposal was determined by the Lexington Urban Renewal Agency to not be in compliance with their requirements. Historic Lexington, Inc.

was notified of the plan's deficiencies and was given an opportunity to correct. Such corrections were not made.

Fourteen buildings in the Lexington urban renewal area were denominated "West High Street Historic District" and on July 10, 1969, were placed on the National Register of historical places. 16 U. S. C. 470. Official notice of this listing appeared on August 5, 1969 in 34 Federal Register.

On July 18, 1969, the Lexington Urban Renewal Agency voted to accept the proposal submitted on July 10, 1969, by the Citizens Union Bank. On July 29, 1969, the regional HUD director notified the Lexington Urban Renewal Agency that he had "no objection to a disposal to the proposed redeveloper." Exhibit 11 of October 28, 1969, deposition of Jennie F. Bryant. The proposal of the Citizens Union Bank was accepted by the Lexington Urban Renewal Agency on September 3, 1969, and on that date a contract was entered into between the parties. The contract required the land to be cleared of all improvements. The deed to the property was tendered on October 1, 1969.

In September, 1969, the Lexington Urban Renewal Agency had advertised for demolition bids for buildings on the property sold to Citizens Union Bank. On October 14, 1969, Jennie Bryant, director of Lexington Urban Renewal Agency, received verbal approval from HUD for demolition of the seven buildings on the 200 block of High Street by Norwood Construction Co. That same day the demolition bid of Norwood Construction Co. was accepted. The demolition contract was entered into between the parties on October 15, 1969. During the evening of October 15, 1969, and the morning of October 16, 1969, demolition was begun on the buildings. This demolition completely destroyed one building and damaged two others.

Court action on this controversy has been in the Fayette County Circuit Court and this court. On October 16, 1969, substantially the same plaintiffs commenced action against substantially the same defendants, with the exception of George Romney. A temporary restraining order was issued to prohibit further demolition of the buildings by Norwood Construction Co. Judge Park of the Fayette Circuit Court on October 21, 1969, entered findings of fact and conclusions of law which dismissed the plaintiffs' complaint for failure to state a claim upon which relief could be granted. In dismissing the complaint and dissolving the restraining order, Judge Park said "this is a final judgment insofar as the plaintiffs' cause of action is concerned." South Hill Association, Inc., et al. v. Urban Renewal and Community Development Agency of the City of Lexington, et al., Fayette Circuit Court First Division No. 25992, Judgment of October 21, 1969. On October 22, 1969, the Kentucky Court of Appeals, sitting en banc, overruled plaintiffs' motion for interlocutory injunctive relief pending appeal.

Action was commenced in this court on October 17, 1969. A temporary restraining order was issued by this court on October 23, 1969, and a hearing was held October 31, 1969. At this hearing it was ordered that the parties enter findings of fact and conclusions of law from which this court could enter a judgment. Federal Rules of Civil Procedure 52. This has been done.

Relief requested in plaintiffs' amended complaint seeks: (1) a preliminary injunction and a permanent injunction without bond—a) against federal defendants enjoining them, including withdrawal of prior approval of funds, to remove or destroy the fourteen buildings in question until the court shall determine they have complied with federal law; b) to restrain federal and local defendants from taking steps to demolish or remove buildings in

controversy, including affirmative orders to prevent private defendants from carrying out acts; c) to restrain private defendants from demolishing, destroying, or removing said buildings; (2) a declaration of rights among parties and reformation of contracts, deeds and agreements relating to destruction of buildings; (3) an order for defendants to reconstruct and repair damaged buildings; (4) an order for federal defendant to refer the matter to Advisory Council on Historic Preservation for comment and for recommendations; (5) court declaration that plaintiffs have rights arising under National Historic Preservation Act and National Housing Act and for court to issue mandamus against federal defendant ordering him to do his duties under the Act; (6) a grant of judicial review of action taken by HUD and Lexington Urban Renewal Agency in undertaking to demolish said buildings; and, (7) all other appropriate relief to which the plaintiffs may be entitled.

The defendant, George Romney (HUD), has moved to dismiss the complaint on the grounds that: (1) plaintiffs lack standing to sue; (2) defendant has no authority over demolition; and, (3) plaintiffs have no right to a hearing.

The remaining defendants move to dismiss plaintiffs' complaint on the grounds: (1) that the complaint fails to state a claim upon which relief can be granted; (2) that plaintiffs are not real parties in interest and have no standing or capacity to bring this action; (3) that this court lacks jurisdiction because it appears on the face of the complaint that plaintiffs state no claim under the Constitution, Laws or Treaties of the United States; (4) that all matters and issues herein involved have been fully determined by the proceedings in state court; and, (5) that the plaintiffs are guilty of laches, waiver and are estopped from enforcing any right or remedies they may have under law.

Plaintiffs attempt to invoke the jurisdiction of this court under 28 U. S. C. 1331(a) by alleging that the amount in controversy exclusive of interest and costs exceeds $10,000 and that the claim arises under the Constitution, law or treaties of the United States. More specifically plaintiffs allege their claims arise under the National Historic Preservation Act of 1966, 16 U. S. C. 470f; the Housing Act of 1949 as amended, 42 U. S. C. 1451(c), (e), 1455(e), 1456(e)(6), (7), 1460(e); the Administrative Procedures Act, 5 U. S. C. 702, 703; 28 U. S. C. 1361; and 28 U. S. C. 1651.

In 1966, Congress enacted the National Historic Preservation Act. 16 U. S. C. 470 *et seq.* Congress found "that the spirit and direction of the Nation are founded upon and reflected in its historic past;" and "that the historical and cultural foundations of the Nation should be preserved. . . ." 16 U. S. C. 470(a), (b). To implement this policy, Congress provided in 16 U. S. C. 470f that:

> "The head of any Federal Agency having direct or indirect jurisdiction over a proposed . . . federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any . . . building, structure, or object that is included in the National Register. The head of any such Federal Agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."

Congress amended the National Housing Act of 1949 so that it would be compatible with the National Historic Preservation Act. See 42 U. S. C. 1460 (b) (2), 1460 (c) (6), 1460 (c) (9), 1460 (c) (10).

In maintaining this action plaintiffs seek to couple the before described policy of historic preservation with 5

U. S. C. 702, 703, 28 U. S. C. 1361 and 28 U. S. C. 1651. The Administrative Procedures Act, 5 U. S. C. 702, provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U. S. C. 703 of the same Act provides:

> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

28 U. S. C. 1361 provides:

> "The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U. S. C. 1651 provides:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

The plaintiffs contend that HUD failed to notify and give a reasonable opportunity for comment to the Ad-

visory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. This, plaintiffs allege, violates 16 U. S. C. 470f and makes HUD (George Romney, Secretary) subject to mandamus action under 28 U. S. C. 1361 and subject to an injunction under 28 U. S. C. 1651. Plaintiffs further contend that the action of HUD would be reviewable under the Administrative Procedures Act. 5 U. S. C. 701 *et seq.*

Defendants deny these allegations and move the court to dismiss the complaint for the reason that plaintiffs lack standing to raise the issues in controversy. This court holds that the plaintiffs lack standing.

It is clear from the outset that plaintiffs do not have standing under the recent doctrine established by the Supreme Court in Flast v. Cohen, 392 U. S. 83 (1968). Plaintiffs have established neither a logical link between their taxpayer status and the type of legislative enactment attacked nor a nexus between their taxpayer status and the precise nature of the constitutional infringement alleged. Supra at 102-3. It is clear, therefore, that plaintiffs do not have standing solely on the ground of being federal taxpayers.

It is likewise clear that none of the plaintiffs have any real interest in this litigation. None of the plaintiffs own or have owned any of the seven buildings in controversy. None of the plaintiffs had legal control or title to the buildings when they were placed on the National Register. The Lexington Urban Renewal Agency had acquired title to these buildings in February, 1969, and the buildings were placed on the Register in July, 1969. None of the plaintiffs, though informed of the urban renewal plan's alternate use for historic preservation, submitted a proposal for development of the area. The plaintiffs' interest in the litigation is not sufficient to give them standing to

bring a mandamus action under 28 U. S. C. 1361, an injunction under 28 U. S. C. 1651, or court review of administrative action under 5 U. S. C. 701 *et seq.* They do not have a personal stake in the outcome. Norwalk Core v. Norwalk Redevelopment Agency, 395 F. 2d 920, 927 (2 Cir. 1968).

Any attempt to gain standing plaintiffs seek under the "private attorney general" doctrine must also fail. This doctrine as developed in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2 Cir. 1965); Office of Communication of United Church of Christ v. Federal Communication Commission, 359 F. 2d 994 (D. C. Cir. 1966); Powelton Civil Home Owners Association v. Department of Housing and Urban Development, 284 F. Supp. 809 (E. D. Pa. 1968); and Road Review League v. Boyd, 270 F. Supp. 650 (S. D. N. Y. 1967), seems to stand for the proposition that persons or groups who by their activities and conduct have exhibited a special interest in areas involved in the suit may be included as parties aggrieved or adversely affected by agency action.

Such a doctrine provides standing under two circumstances: (1) when the plaintiffs are citizens of the area and their direct interests are to be affected, see Norwalk Core v. Norwalk Redevelopment Agency, supra; Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N. D. Cal. 1968); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, supra; and (2) when the group seeking to represent the citizens has been actively engaged in the administrative process and has thereby shown a special interest in the area in controversy. Scenic Hudson Preservation Conference v. Federal Power Commission, supra; Road Review League v. Boyd, supra.

Plaintiffs in this action have met neither standard. Those plaintiffs who are citizens of the area, Mrs. Stathis

Kafoglis and Mr. and Mrs. W. T. Dennis, have no interest in the seven buildings to be demolished in the 200 block of West High Street. The National Register for historic buildings has been in existence since 1966. Not until July 10, 1969, however, were any of these buildings placed on the Register. The Lexington urban renewal plan, since July, 1968, has provided an alternate use for historic preservation. None of the plaintiffs, however, have submitted such a plan. The plaintiffs have not sufficiently engaged in the administrative process to show a special interest in the controversy so as to be included among those parties aggrieved or adversely affected by agency action. See Green Street Association v. Daley, 373 F. 2d 1 (7 Cir. 1967); Harrison-Halstead Community Group, Inc. v. Housing and Home Finance Agency, 310 F. 2d 99 (7 Cir. 1962); South Suburban Safeway Lines, Inc. v. City of Chicago, 285 F. Supp. 676 (N. D. Ill. 1968).

It is the conclusion of the court, therefore, that the plaintiffs lack standing to sue. If it had been concluded that plaintiffs had standing to invoke the jurisdiction of this court, dismissal of plaintiffs' complaint would still be in order.

If plaintiffs did have standing to bring this action, they could still not receive the relief they seek. The Lexington urban renewal plan, Ky. R-63, was first formulated in 1965 and was approved by HUD on June 7, 1966. At this time a "Loan and Capital Grant Contract" was entered into between HUD and Lexington Urban Renewal Agency. This plan was first amended in July of 1968 and provided for demolition of the buildings or an alternate use of historic preservation. This amendment was approved by HUD on October 18, 1968. The plan was again amended in January of 1969. The amendment carried the same provision as the first concerning demolition or preservation. This second amendment was approved by HUD on May 8, 1969. All of these contracts between the Lexington

Urban Renewal Agency and HUD provided for the expenditure of federal funds for demolition of the buildings. At none of these times did any buildings in the plan area appear on the National Register for historic places. HUD was, therefore, under no duty to notify the Advisory Council on Historic Preservation. Rumors of buildings with historic significance is not enough to require HUD to take this action. Placement on the Register is what is required.

Based upon the loan and capital grant contracts, the Lexington Urban Renewal Agency sought proposals and bids for the property in question. These bids were to be submitted July 10, 1969. None of the plaintiffs submitted a proposal, but on the same day (July 10) placed the buildings on the National Register. Their contention that subsequent approval by HUD of demolition of some of these buildings without compliance with 16 U. S. C. 470f is without merit. 16 U. S. C. 470f and the duty contained therein refers only to times when plans or amendments to plans are authorized and resulting loan and capital grant contracts are entered between HUD and local urban renewal agencies. Any other construction of the statute would place too great a burden on the urban renewal administrative process. See Judge Thorton's opinion in Kent County Council for Historic Preservation v. George W. Romney, Civil Action No. 6174 (W. D. Mich. October 2, 1969). Even if plaintiffs did have standing, approval of the last amendment to the plan, Ky. R-63, was prior to the listing of the buildings on the National Register. Thus, 16 U. S. C. 470f imposed no duty on HUD to notify the Advisory Council on Historic Preservation.

The issues heretofore resolved are dispositive of the case at bar. There is, therefore no need to consider other allegations made by the parties.

It is the opinion of this court: (1) that the Temporary Restraining Order entered on October 22, 1969, should be

dissolved; (2) that the plaintiffs' motion for temporary injunction should be overruled, Nashville I-40 Steering Committee v. Ellington, 387 F. 2d 179 (6 Cir. 1967), cert. denied, 390 U. S. 921 (1968); Barron & Holtzoff ss. 1433; and, (3) that the motions to dismiss by all defendants should be sustained.

An order in accordance with this memorandum is this day entered.

Mac Swinford
Judge

United States District Court
Eastern District of Kentucky
Lexington

South Hill Neighborhood Association, Inc., Etc., et al.,
Plaintiffs,
v.
George Romney, Secretary of Housing and Urban Development, et al.,
Defendants.
No. 2080.

Order

(Filed 11-19-69)

The motion of the plaintiffs for an order restraining defendants, pending hearing and determination of plaintiffs' appeal to the United States Court of Appeals for the Sixth Circuit from the judgment of this court entered November 14, 1969, denying plaintiffs' motion for a preliminary injunction is overruled.

The court is of the opinion that for reasons given in a memorandum and order very recently filed that a further restraining order should not be granted by this court

but that the matter should more appropriately address itself to the appellate court to which an appeal has been taken.

Mac Swinford, Judge

November 19, 1969

No. 19,995

United States Court of Appeals
For the Sixth Circuit

South Hill Neighborhood Association, Inc., a Nonprofit Incorporated Association of the Commonwealth of Kentucky; The Bluegrass Trust for Historic Preservation, Inc., a Nonprofit Incorporated Association of the Commonwealth of Kentucky; Curtis Harrison; Mrs. Stathis Kafoglis; Mr. and Mrs. W. T. Dennis; on Behalf of Themselves and All Other United States or Kentucky Citizens, Taxpayers, Property Owners, or Historic Preservation Groups and Persons Similarly Situated.
Appellants,

vs.

George Romney, Secretary of the United States Department of Housing and Urban Development,
The City of Lexington, Kentucky; Honorable Charles Wylie; Mayor of the City of Lexington; The Board of City Commissioners of the City of Lexington; Joseph Graves, Member of the Board; Harry Sykes, Member of the Board; Thomas Underwood, Member of the Board; Fred Fugazzi, Member of the Board; Urban Renewal and Community Development Agency of the City of Lexington, a Municipal Corporation; Robert E. Featherston, Chairman; William R. Embry, Vice-Chairman; Byron Romanowitz, Member; D. C. Noble, Member; H. J. Hagler, Member; Jennie Bryant, Director of the Urban Renewal and Community Development Agency of the City of Lexington,
Citizens Union National Bank and Trust Company, Inc., a Kentucky Corporation; Norwood Construction Company, Inc., a Kentucky Corporation; J. Norwood Hodge, President of Norwood Construction Company,
Appellees.

On Appeal From the United States District Court for the Eastern District of Kentucky

Decided Nov. 24, 1969

Before: Phillips, Chief Judge, and Peck and Combs, Circuit Judges.

Per Curiam. The subject matter of this action, which has come on for consideration by this panel at the direction of the Chief Judge, has been the core of a controversy which has seen the parties at odds in both administrative and judicial proceedings. The latter have in-

cluded an action in the courts of the Commonwealth of Kentucky with review by its Court of Appeals, sitting en banc, with negative results to the plaintiffs, and an action with a similar conclusion in the District Court, from which the present appeal was perfected.

The ultimate aim of the plaintiffs is the protection from demolition of fourteen buildings, claimed to be of historic significance, which stand in an area designated for improvement under the Urban Renewal Plan of the City of Lexington, Kentucky, all as appearing in detail in the documents before us, as will be later herein commented upon.

The matter is before this Court for consideration of certain motions, the first of which is the plaintiffs-appellants' Motion for Injunction Pending Appeal. Subsequent motions include defendants-appellees' Motion to Require Plaintiffs to File Bond, which will not herein be considered for reasons which will be later apparent, and the motion of certain appellees for an order denying injunctive relief pending appeal. We choose to and will consider the latter motion as a motion to affirm the judgment of the District Court and as having been filed under the provisions of Rule 8(b) of the Rules of this Court.* The propriety of such consideration as well as the fact that appellants have been apprised of such nature of the motion will readily appear from Branch (2) of the motion and from the conclusion of the memorandum in support thereof wherein "it is respectfully concluded that this

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* "Rule 8—MOTION TO DISMISS OR AFFIRM. Within fifteen days after the appeal has been docketed in this court, the appellee may file a motion to dismiss or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss. . . .

"(b) The court will receive a motion to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. . . ."

court should deny the injunctive relief requested by the Appellants **and affirm the Order of the District Court** . . ." (Emphasis supplied). Responsive to our requests, counsel have with expedition and obvious diligence favored us with exhaustive briefs which have been most helpful in acquainting the Court with the facts and offering citations to applicable legal principles. Without implying criticism but rather to illustrate the breadth of the factual presentation before us, we observe that the briefs, perhaps particularly those of the appellants, go occasionally outside the record, and offer averments not otherwise evidenced. To the extent that they are germane to our consideration, however, all uncontroverted representations have been taken into account.

We thus note the contention of the appellees in the motion we consider as one to affirm to the effect that "unless this appeal is fully and finally disposed of prior to November 28, 1969, the Urban Renewal Plan of the City of Lexington, Kentucky, will be placed in grave jeopardy and probably destroyed."

The Order from which this appeal was perfected was entered by Judge Mac Swinford in the United States District Court for the Eastern District of Kentucky, and was accompanied by an exhaustive Memorandum. Rather than restate, paraphrase or extensively quote from that Memorandum, due to the exigencies of time urged upon us by all parties, we attach Judge Swinford's Memorandum hereto as Appendix A. In addition to the authorities cited in that memorandum, reference is made to this Court's opinion in **Moist v. Belk**, 380 F. 2d 720, **cert. denied**, 389 U. S. 960 (1967). It is here determined that the District Court properly dissolved the Temporary Restraining Order previously entered by it, overruled the plaintiffs' Motion for Temporary Injunction and sustained the defendants' Motion to Dismiss and dismissed the complaint as

amended, and it is further here determined that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and that therefore the motion to affirm is well taken and should be sustained.

The judgment of the District Court is affirmed.

The National Historic Preservation Act of 1966

Public Law 89-665

October 15, 1966

An Act

To establish a program for the preservation of additional historic properties throughout the Nation, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

The Congress finds and declares—

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and

(d) that, although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

Title I

Sec. 101. (a) The Secretary of the Interior is authorized—

(1) to expand and maintain a national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture, hereinafter referred to as the National Register, and to grant funds to States for the purpose of preparing comprehensive statewide historic surveys and plans, in accordance with criteria established by the Secretary, for the preservation, acquisition, and development of such properties;

(2) to establish a program of matching grants-in-aid to States for projects having as their purpose the preservation for public benefit of properties that are significant in American history, architecture, archeology, and culture; and

(3) to establish a program of matching grant-in-aid to the National Trust for Historic Preservation in the United States, chartered by act of Congress approved October 26, 1949 (63 Stat. 927), as amended,

for the purpose of carrying out the responsibilities of the National Trust.

(b) As used in this Act—

(1) The term "State" includes, in addition to the several States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "project" means programs of State and local governments and other public bodies and private organizations and individuals for the acquisition of title or interests in, and for the development of, any district, site, building, structure, or object that is significant in American history, architecture, archeology, and culture, or property used in connection therewith, and for its development in order to assure the preservation for public benefit of any such historical properties.

(3) The term "historic preservation" includes the protection, rehabilitation, restoration, and reconstruction of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, or culture.

(4) The term "Secretary" means the Secretary of the Interior.

Sec. 102. (a) No grant may be made under this Act—

(1) unless application therefor is submitted to the Secretary in accordance with regulations and procedures prescribed by him;

(2) unless the application is in accordance with the comprehensive statewide historic preservation plan which has been approved by the Secretary after considering its relationship to the comprehensive statewide outdoor recreation plan prepared pursuant

to the Land and Water Conservation Fund Act of 1965 (78 Stat. 897);

(3) for more than 50 per centum of the total cost involved, as determined by the Secretary and his determination shall be final;

(4) unless the grantee has agreed to make such reports, in such form and containing such information as the Secretary may from time to time require;

(5) unless the grantee has agreed to assume, after completion of the project, the total cost of the continued maintenance, repair, and administration of the property in a manner satisfactory to the Secretary; and

(6) until the grantee has complied with such further terms and conditions as the Secretary may deem necessary or advisable.

(b) The Secretary may in his discretion waive the requirements of subsection (a), paragraphs (2) and (5) of this section for any grant under this Act to the National Trust for Historic Preservation in the United States, in which case a grant to the National Trust may include funds for the maintenance, repair, and administration of the property in a manner satisfactory to the Secretary.

(c) No State shall be permitted to utilize the value of real property obtained before the date of approval of this Act in meeting the remaining cost of a project for which a grant is made under this Act.

Sec. 103. (a) The amounts appropriated and made available for grants to the States for comprehensive statewide historic surveys and plans under this Act shall be apportioned among the States by the Secretary on the basis of needs as determined by him: Provided, however,

That the amount granted to any one State shall not exceed 50 per centum of the total cost of the comprehensive statewide historic survey and plan for that State, as determined by the Secretary.

(b) The amounts appropriated and made available for grants to the States for projects under this Act for each fiscal year shall be apportioned among the States by the Secretary in accordance with needs as disclosed in approved statewide historic preservation plans.

The Secretary shall notify each State of its apportionment, and the amounts thereof shall be available thereafter for payment to such State for projects in accordance with the provisions of this Act. Any amount of any apportionment that has not been paid or obligated by the Secretary during the fiscal year in which such notification is given, and for two fiscal years thereafter, shall be reapportioned by the Secretary in accordance with this subsection.

Sec. 104. (a) No grant may be made by the Secretary for or on account of any survey or project under this Act with respect to which financial assistance has been given or promised under any other Federal program or activity, and no financial assistance may be given under any other Federal program or activity for or on account of any survey or project with respect to which assistance has been given or promised under this Act.

(b) In order to assure consistency in policies and actions under this Act with other related Federal programs and activities, and to assure coordination of the planning acquisition, and development assistance to States under this Act with other related Federal programs and activities, the President may issue such regulations with respect thereto as he deems desirable, and such assistance may be provided only in accordance with such regulations.

Sec. 105. The beneficiary of assistance under this Act shall keep such records as the Secretary shall prescribe, including records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

Sec. 106. The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Sec. 107. Nothing in this Act shall be construed to be applicable to the White House and its grounds, the Supreme Court building and its grounds, or the United States Capitol and its related buildings and grounds.

Sec. 108. There are authorized to be appropriated not to exceed $2,000,000 to carry out the provisions of this Act for the fiscal year 1967, and not more than $10,000,000 for each of the three succeeding fiscal years. Such appropriations shall be available for the financial assistance authorized by this title and for the administrative expenses of the Secretary in connection therewith, and shall remain available until expended.

Title II

Sec. 201. (a) There is established an Advisory Council on Historic Preservation (hereinafter referred to as the "Council") which shall be composed of seventeen members as follows:

(1) The Secretary of the Interior.

(2) The Secretary of Housing and Urban Development.

(3) The Secretary of Commerce.

(4) The Administrator of the General Services Administration.

(5) The Secretary of the Treasury.

(6) The Attorney General.

(7) The Chairman of the National Trust for Historic Preservation.

(8) Ten appointed by the President from outside the Federal Government. In making these appointments, the President shall give due consideration to the selection of officers of State and local governments and individuals who are significantly interested and experienced in the matters to be considered by the Council.

(b) Each member of the Council specified in paragraphs (1) through (6) of subsection (a) may designate another officer of his department or agency to serve on the Council in his stead.

(c) Each member of the Council appointed under paragraph (8) of subsection (a) shall serve for a term of five years from the expiration of his predecessor's term; except that the members first appointed under that paragraph shall serve for terms of from one to five years, as designated by the President at the time of appointment, in such manner as to insure that the terms of not less

than one nor more than two of them will expire in any one year.

(d) A vacancy in the Council shall not affect its powers, but shall be filled in the same manner as the original appointment (and for the balance of the unexpired term).

(e) The Chairman of the Council shall be designated by the President.

(f) Eight members of the Council shall constitute a quorum.

SEC. 202. (a) The Council shall—

(1) advise the President and the Congress on matters relating to historic preservation; recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation; and advise on the dissemination of information pertaining to such activities;

(2) encourage, in cooperation with the National Trust for Historic Preservation and appropriate private agencies, public interest and participation in historic preservation;

(3) recommend the conduct of studies in such areas as the adequacy of legislative and administrative statutes and regulations pertaining to historic preservation activities of State and local governments and the effects of tax policies at all levels of government on historic preservation;

(4) advise as to guidelines for the assistance of State and local governments in drafting legislation relating to historic preservation; and

(5) encourage, in cooperation with appropriate public and private agencies and institutions, training and education in the field of historic preservation.

(b) The Council shall submit annually a comprehensive report of its activities and the results of its studies to the President and the Congress and shall from time to time submit such additional and special reports as it deems advisable. Each report shall propose such legislative enactments and other actions as, in the judgment of the Council, are necessary and appropriate to carry out its recommendations.

Sec. 203. The Council is authorized to secure directly from any department, bureau, agency, board, commission, office, independent establishment or instrumentality of the executive branch of the Federal Government information, suggestions, estimates, and statistics for the purpose of this title; and each such department, bureau, agency, board, commission, office, independent establishment or instrumentality is authorized to furnish such information, suggestions, estimates, and statistics to the extent permitted by law and within available funds.

Sec. 204. The members of the Council specified in paragraphs (1) through (7) of section 201(a) shall serve without additional compensation. The members of the Council appointed under paragraph (8) of section 201(a) shall receive $100 per diem when engaged in the performance of the duties of the Council. All members of the Council shall receive reimbursement for necessary traveling and subsistence expenses incurred by them in the performance of the duties of the Council.

Sec. 205. (a) The Director of the National Park Service or his designee shall be the Executive Director of the Council. Financial and administrative services (including those relating to budgeting, accounting, financial reporting, personnel and procurement) shall be provided the Council by the Department of the Interior, for which payments shall be made in advance, or by reimbursement, from funds of the Council in such amounts as may be agreed upon by the Chairman of the Council and the

Secretary of the Interior: Provided, That the regulations of the Department of the Interior for the collection of indebtedness of personnel resulting from erroneous payments (5 U. S. C. 46c) shall apply to the collection of erroneous payments made to or on behalf of a Council employee, and regulations of said Secretary for the administrative control of funds (31 U. S. C. 665 (g)) shall apply to appropriations of the Council; And provided further, That the Council shall not be required to prescribe such regulations.

(b) The Council shall have power to appoint and fix the compensation of such additional personnel as may be necessary to carry out its duties, without regard to the provisions of the civil service laws and the Classification Act of 1949.

(c) The Council may also procure, without regard to the civil service laws and the Classification Act of 1949, temporary and intermittent services to the same extent as is authorized for the executive departments by section 15 of the Administrative Expenses Act of 1946 (5 U. S. C. 55a), but at rates not to exceed $50 per diem for individuals.

(d) The members of the Council specified in paragraphs (1) through (6) of section 201(a) shall provide the Council, on a reimbursable basis, with such facilities and services under their jurisdiction and control as may be needed by the Council to carry out its duties, to the extent that such facilities and services are requested by the Council and are otherwise available for that purpose. To the extent of available appropriations, the Council may obtain, by purchase, rental, donation, or otherwise, such additional property, facilities, and services as may be needed to carry out its duties.

Approved October 15, 1966.

Codified 16 U. S. C., § 470.

Extract From the Demonstration Cities and Metropolitan Development Act of 1966

Public Law 89-754

November 3, 1966

Title VI—Preservation of Historic Structures

Preservation of Historic Structures as Part of Urban Renewal Projects

Sec. 601. (a) Section 110(b) of the Housing Act of 1949[21] is amended by inserting "historic and architectural preservation," after "land acquisition,".

(b) Section 110(c) (6) of such Act[22] is amended by inserting "to promote historic and architectural preservation," after "deterioration,".

(c) Section 110(c) of such Act is further amended by striking out "and" at the end of clause (8), and by striking out clause (9) and inserting in lieu thereof the following:

"(9) relocation within or outside the project area of structures which will be restored and maintained for architectural or historic purposes; and

"(10) restoration of acquired properties of historic or architectural value."

Local Grant-in-Aid Credit for Relocation and Restoration of Historic Structures

Sec. 602. Clause (2) of section 110(d) of the Housing Act of 1949[23] is amended by striking out "clause (2) and

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[21] 42 U. S. C. A., § 1460(b).

[22] 42 U. S. C. A., § 1460(c) (6).

[23] 42 U. S. C. A., § 1460(d) (2).

clause (3)" and inserting in lieu thereof "clauses (2), (3), (9), and (10)".

Grants to National Trust for Historical Preservation to Cover Restoration Costs

Sec. 603. (a) The Secretary of Housing and Urban Development is authorized to make grants to the National Trust for Historic Preservation, on such terms and conditions and in such amounts (not exceeding $90,000 with respect to any one structure) as he deems appropriate, to cover the costs incurred by such Trust in renovating or restoring structures which it considers to be of historic or architectural value and which it has accepted and will maintain (after such renovation or restoration) for historic purposes.

(b) There are authorized to be appropriated such sums as may be necessary for the grants to be made under subsection (a).

Urban Planning Grants for Surveys of Historic Structures

Sec. 604. Section 701 of the Housing Act of 1954[24] is amended by adding at the end thereof the following new subsection:

"(h) In addition to the other grants authorized by this section, the Secretary is authorized to make grants to assist any city, other municipality, or county in making a survey of the structures and sites in such locality which are determined by its appropriate authorities to be of historic or architectural value. Any such survey shall be designed to identify the historic structures and sites in the locality, determine the cost of their rehabilitation or restoration, and provide such other information as may be necessary or appropriate to serve as a foundation

[24] 40 U. S. C. A., § 461.

for a balanced and effective program of historic preservation in such locality. The aspects of any such survey which relate to the identification of historic and architectural values shall be conducted in accordance with criteria found by the Secretary to be comparable to those used in establishing the National Register maintained by the Secretary of the Interior under other provisions of law; and the results of each such survey shall be made available to the Secretary of the Interior. A grant under this subsection shall not exceed two-thirds of the cost of the survey for which it is made, and shall be made to the appropriate agency or entity specified in paragraphs (1) through (9) of subsection (a) or, if there is no such agency or entity which is qualified and willing to receive the grant and provide for its utilization in accordance with this subsection, directly to the city, other municipality, or county involved."

Grants for Historic Preservation

Sec. 605. (a) The heading of title VII of the Housing Act of 1961 is amended to read as follows:

"Title VII—Open-space Land, Urban Beautification, and Historic Preservation"

(b) Section 701 of such Act[25] is amended by redesignating subsection (c) as subsection (d), and by inserting after subsection (b) a new subsection as follows:

"(c) The Congress further finds that there is a need for timely action to preserve and restore areas, sites, and structures of historic or architectural value in order that these remaining evidences of our past history and heritage shall not be lost or destroyed through the expansion and development of the Nation's urban areas."

[25] 42 U. S. C. A., § 1500.

(c) Section 701(d) of such Act (as redesignated by subsection (b) of this section)[26] is amended—

(1) by inserting after "urban development," the following: "to assist in preserving areas and properties of historic or architectural value,"; and

(2) by striking out "and (2)" and inserting in lieu thereof "(2) acquire, improve, and restore areas, sites, and structures of historic or architectural value, and (3)"

(d) Section 702(e) of such Act[27] is amended to read as follows:

"(e) The Secretary shall consult with the Secretary of the Interior on the general policies to be followed in reviewing applications for grants under this title. To assist the Secretary in such review, the Secretary of the Interior shall furnish him (1) appropriate information on the status of national and statewide recreation and historic preservation planning as it affects the areas to be assisted with such grants, and (2) the current listing of any districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture which may be contained on a National Register maintained by the Secretary of the Interior pursuant to other provisions of law. The Secretary shall provide current information to the Secretary of the Interior from time to time on significant program developments."

(e) Section 706 of such Act[27a] is amended by striking out the proviso.

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[26] 42 U. S. C. A., § 1500(d).

[27] 42 U. S. C. A., § 1500a(e).

[27a] 42 U. S. C. A., § 1500c—2.

(f) Section 708 of such Act[28] is amended by inserting "(a)" after "Sec. 708.", by inserting "(b)" before "The" in the second paragraph, and by adding at the end thereof a new subsection as follows:

"(c) Notwithstanding any other provision of this title, the Secretary may use not to exceed $10,000,000 of the sum authorized for contracts under this title for the purpose of entering into contracts to make grants in amounts not to exceed 90 per centum of the cost of activities which he determines have special value in developing and demonstrating new and improved methods and materials for use in carrying out the purposes of this title."

(g) Title VII of such Act is amended by redesignating section 709 as section 710, and by adding after section 708 a new section as follows:

"Grants for Historic Preservation

"Sec. 709. The Secretary is authorized to enter into contracts to make grants to States and local public bodies to assist in the acquisition of title to or other permanent interests in areas, sites, and structures of historic or architectural value in urban areas, and in their restoration and improvement for public use and benefit, in accord with the comprehensively planned development of the locality. The amount of any such grant shall not exceed 50 per centum of the total cost, as approved by the Secretary, of the assisted activities. The remainder of such cost shall be provided from non-Federal sources.

(h) Commencing three years after the date of the enactment of this Act, no grant shall be made (except pursuant to a contract or commitment entered into less than three years after such date) under section 709 of the

[28] 42 U. S. C. A., § 1500d.

Housing Act of 1961 or section 701(h) of the Housing Act of 1954, or under section 103 of the Housing Act of 1949 to the extent that it is to be used for historic or architectural preservation, except with respect to districts, sites, buildings, structures, and objects which the Secretary of Housing and Urban Development finds meet criteria comparable to those used in establishing the National Register maintained by the Secretary of the Interior pursuant to other provisions of law.

Title VII—Urban Renewal

Local Grants-In-Aid

Sec. 701. Section 110(d) of the Housing Act of 1949[29] is amended by inserting immediately after the colon at the end of the first proviso the following: "Provided further, That any publicly owned facility, the construction of which was begun not earlier than three years prior to the date of enactment of the Demonstration Cities and Metropolitan Development Act of 1966, shall be deemed to benefit as urban renewal project or projects to the extent of 25 per centum of the total benefits of such facility, or $3,500,000, whichever is less, if such facility (A) (i) is used, or is to be used, by the public predominantly for cultural, exhibition, or civic purposes, or is a city hall or a public safety building, or (ii) is a facility, constructed or rehabilitated by a public university, which is or will be devoted to the treatment of physical or mental disabilities and illness or to medical research; (B) is located within, adjacent to, or in the immediate vicinity of such urban renewal project or projects; (C) is found to contribute materially to the objectives of the urban renewal plan or plans for such project or projects; and (D) is not otherwise eligible as a local grant-in-aid:".

[29] 42 U. S. C. A., § 1460(d).

Air Rights Sites in Urban Renewal Projects

Sec. 702. (a) Section 110(c) (1) of the Housing Act of 1949[30] is amended by inserting in clause (iv), between the word "income" and the colon immediately preceding the first proviso, the following: "or, if the area is found by the local public agency to be unsuitable for use for low or moderate income housing, for use for industrial development".

(b) Section 110(c) (7) of such Act[31] is amended by inserting immediately before the semicolon the following: ", or construction of foundations and platforms necessary for the provision of air rights sites for industrial development".

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[30] 42 U. S. C. A., § 1460(c) (1).

[31] 42 U. S. C. A., § 1460(c) (7).

Fayette Circuit Court
First Division

Jan. 14, 1970

Urban Renewal and Community Development Agency of the City of Lexington, Ky.,
Plaintiff,
vs.
Anna Kafoglis,
Defendant.
No. 22,923.

Urban Renewal and Community Development Agency of the City of Lexington, Ky.,
Plaintiff,
vs.
William Thomas Dennis, et al.,
Defendants.
No. 22,970.

Additional Findings of Fact and Conclusions of Law

Pursuant to the Court's opinion of December 24, 1969 containing the Court's Findings of Fact and Conclusions of Law, an order has been entered in each of these cases, adjudging that the plaintiff has the right to condemn the properties in question pursuant to Chapter 9 of the Kentucky Revised Statutes. The matter is now pending before the Court upon the defendants' motion to alter and amend the Findings of Fact and Conclusions of Law contained in the opinion of December 24, 1969 with respect to the date of acquisition of stock by Agency members Embry and Hagler in the Merchants Parking Lot.

On page 5 of the original opinion, the Court found that the interests of Embry and Hagler was acquired prior to the adoption of the downtown urban renewal plan of 1965. Contained in the Application to HUD dated July 22, 1968, for Loan and Grant with respect to the first amendment to the downtown urban renewal plan is a disclosure of the ownership interest of Hagler in the Merchants Parking Lot. The Application reveals that Hagler's interest was acquired in 1959. There is no information contained in this July 22, 1968 Application with respect to any ownership interest of Embry in the parking lot.

In the Application for Loan and Grant dated January, 1969, made to HUD with respect to the second amendment to the downtown urban renewal plan, Embry's stock interest in the Merchants Parking Lot is revealed for the first time. The Application of January, 1969, does not indicate when Embry acquired his interest in the parking lot. Inasmuch as his interest was not disclosed in the Application dated July 22, 1968, the Court concludes Embry either acquired his interest in the Merchants Parking Lot after the adoption of the downtown urban renewal plan or had previously failed to disclose such interest. This would constitute a violation of KRS 99.350 (7) in either event.

However, violation of this statute would not necessarily nullify the actions of the Agency although it might constitute misconduct in office. In Re: Certain Parcels of Real Estate, 420 Pa. 289, 216 A. 2d 774. For the reasons previously stated, the Court concludes that Embry's interest in the Merchants Parking Lot, whenever acquired, does not invalidate the Agency's actions involved in these cases. If Embry acquired his interest after the adoption of the downtown urban renewal plan in violation of the statute, this could not invalidate the original plan adopted in 1965 which contemplated the acquisition of the defendants' property.

The foregoing shall constitute additional Findings of Fact and Conclusions of Law. In all other respects, the Court's opinion of December 24, 1969 is reaffirmed. The orders entered in each of these cases adjudging that the plaintiff has the right to condemn should not be set aside or modified, the Court being still of the opinion that the plaintiff has the right to condemn the properties in question.

There is also pending plaintiff's motion in each case for an order pursuant to KRS 99.420 (9) that it is entitled to immediate possession and full and complete use and control of the properties sought to be condemned. This motion should be sustained in each case.

The Clerk will make this opinion a part of the record. The attorneys will prepare an order in conformity herewith.

James Park, Jr.
Judge

January 13, 1970.

— Copies to: Hon. Roger Sledd
Hon. James Clay

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1210

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., et al.,
Petitioners,

vs.

GEORGE ROMNEY, Secretary of Housing and Urban Development, et al.,
Respondents.

SUPPLEMENTARY PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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SUPPLEMENTARY PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTARY STATEMENT

The Petition for Certiorari was filed on February 19, 1970. The brief of the local Respondents in opposition was filed and service was received on March 3, 1970. On that date, this Court decided **Association of Data Processing Service Organizations, Inc. v. Camp** (Oct. Term, No. 85), 38 United States Law Week 4193, and **Barlow v. Collins** (Oct. Term, No. 249), 38 United States Law Week 4195. On March 10, 1970 the Petitioners filed an application with this Court for injunction pending review by certiorari. The Respondents filed a response in opposition and this Court denied the application for injunction on March 13, 1970. On March 23, 1970, the Petitioners received

service of the brief of respondent HUD in opposition to the petition for certiorari. The instant supplementary brief addresses itself to the application of the **Data Processing** and **Barlow v. Collins** cases to the pending petition for certiorari.

REASONS FOR GRANTING THE WRIT

I

The Ruling Below Conflicts With Recent Decisions by This Court on the Standing Issue.

Petitioners clearly have standing to sue under the rulings by this Court in **Data Processing v. Camp** and **Barlow v. Collins**. These two new decisions throw into bold relief the error of the lower courts which employed the wrong tests to determine standing in this case. Respondent HUD seemingly now concedes the standing issue and contends that Petitioners have insufficient "legal interest" to prevail on the merits.[1] Similarly, the local Respondents have tacitly conceded the standing point and contend that the quantum of Petitioners' "interests" is insufficient to satisfy the tests enunciated in **Data Processing** and **Barlow**.[2] These concessions underscore the need for review of the lower court ruling which is in conflict with these new decisions and which is so clearly erroneous it should not be allowed to stand.

Petitioners alleged "injury in fact" to their economic and aesthetic conservational interests caused by the refusal of Respondent HUD to perform the administrative

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[1] Brief for the Respondent Secretary of Housing and Urban Development, page 8. This contention is discussed in part II of this supplementary petition.

[2] Response of Certain Respondents to Application of Petitioners for Injunction Pending Review by Certiorari, page 3.

actions commanded by the relevant federal statute.[3] Further, Petitioners are "arguably within the zone of interests" protected by the National Historic Preservation Act of 1966. Companion legislation, the overall legislative scheme and ample legislative history establish the zone of interests protected by Section 106 to be historic preservation and protection of National Register properties from destruction by federally assisted activities. Petitioners are historic preservationists representing the interests of that class and the public at large in pursuit of the federally-recognized aesthetic conservational values of historic preservation and they also act as statutory beneficiaries of the federal statutory protection scheme designed to preserve those values.

Both their economic and aesthetic conservational interests will be injured in fact by the Administrative action being challenged.

Respondent HUD does not now contest that the agency action here challenged is reviewable by the courts. The local Respondents, however, seem to contend that the protested agency action is not judicially reviewable because committed to agency discretion by law.[4] They contend that Respondent HUD is invested with absolute discretion to decide whether National Register properties may be demolished with federal funds. That administrative decision may or may not be judicially reviewable. A different lawsuit would have to test that particular assertion since HUD never made such a decision in this case. Indeed, the case arises because HUD refused to make that decision. The issue in this case is whether HUD has absolute discretion to disregard the explicit commands of Section

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[3] The essential factual allegations in the Complaint, which were uncontroverted, are summarized in footnote 4, page 16 of the Petition for Writ of Certiorari and need not be repeated here.

[4] Brief of Certain Respondents, page 24.

106 specifying the administrative procedures it must follow prior to approving demolition of National Register properties with federal funds, namely, referral for comment to the Advisory Council and taking their comment into account. Petitioners are challenging administrative default by HUD—not an administrative decision HUD made.[5] Judicial reviewability of HUD's administrative procedural actions in this context is to be determined by reference to the intent of Congress on this point when it enacted Section 106. Both **Data Processing** and **Barlow** establish that the presumption is that agency action is judicially reviewable and will prevail unless there is clear and convincing statutory indicia that Congress intended otherwise. Respondents cite no such evidence.

II

Important Questions of the Federal Law of Historic Preservation Were Determined by the Lower Court Without Full Consideration of the Merits

The **Data Processing** and **Barlow** decisions make abundantly clear that questions of standing are to be carefully separated from inquiry into the merits in order that parties challenging administrative actions receive "full consideration of their claims on the merits." Nothing is clearer in this case than the fact that Petitioners have never received "the focused and careful decision on the merits to which they are clearly entitled." Neither of the lower courts in this case fully inquired into the merits.[6] The contentions asserted by both Respondents

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[5] See **Scanwell Laboratories, Inc. v. Thomas** (CA DC 2/13/70), 38 U. S. Law Week 2454.

[6] The briefs submitted to the Federal District Court were directed by order of the Court to the questions of "Jurisdiction" and "Standing" and neither the truncated evidentary hearing nor any oral argument in that Court involved full inquiry into the merits. The Sixth Circuit Court of Appeals had no record before it, held no hearing or oral argument and did not independently address the merits in their ruling.

before this court demonstrate the need for review in order that judicial interpretation of Section 106 be given the focused attention it warrants and has not yet received.

Respondent HUD asserts the "legal interest" requirement in contending that Petitioners cannot prevail on the merits because they "have no legal interest in compelling HUD to carry out the requirements of Section 106."[7] The requirement of a "legal interest" goes to the "merits," namely whether the administrative action challenged produced injury in fact to an interest protected by the relevant statute. The same statutory materials evidencing that Petitioners are members of a protected statutory class entitled to judicial review, similarly evidence sufficient "legal interest" conferred by Section 106 for purposes of the merits.[8] If anything more in the way of "legal interest" is required, then Petitioner South Hill Neighborhood Association, Inc., has such a "legal interest" by virtue of the economic and non-economic interests it has in protecting the historic character of the South Hill neighborhood. Petitioners Dennis and Kafoglis clearly hold such additional interest by reason of their ownership of National Register buildings—the unique status of which rests on the National Historic Preservation Act of 1966. Nothing in the **Data Processing** or **Barlow** decisions suggests that their right to contest in condemnation proceedings in state courts the administrative and legal actions of a local agency, forecloses federal

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[7] The Federal District Court in ruling that Petitioners did not have standing held that they had no "real interest" in the litigation, Petition for a Writ of Certiorari, A-56, and had no "special interest" in the controversy, Ibid. A-58, but did not advert expressly to "legal interest" at all and did not mention any "interest" in ruling on the merits.

[8] Brennan J., concurring and dissenting in **Association of Data Processing Service Organizations, Inc., et al. v. Camp., et al., Clemon Barlow et al. v. B. L. Collins, et al.** (Oct. Term 1969 Nos. 85 and 249), 38 U. S. L. W. 4198.

judicial review of totally different administrative actions by a federal agency. The inefficacy of indirect protest in the state courts as a procedural alternative to direct federal judicial review of agency action is demonstrated by the events in the companion case.[9]

Focused judicial review of the merits is required to determine whether HUD violated Section 106. The "plain meaning" of Section 106 urged by Respondent is not self-evident. Respondent HUD urges that its approval of urban renewal plans includes approval of the expenditure of federal funds.[10] The word "expenditure" in common parlance means simply payment. Congress normally uses "expenditure" to mean the act of payment of money, and uses "obligation" or "commitment" to signify the incurring of a liability by a federal agency.[11] HUD actually expends money on a given urban renewal project by periodic payments to the local public agency. No judicial inquiry into this aspect of the merits has yet occurred in this case.

Nor is it self-evident that an undue administrative burden would be caused by requiring HUD to apply Section 106 to the implementation phase of urban renewal projects. Judicial determination of "undue burden" normally follows careful elucidation of facts of the administrative process and a study of the legislation and legislative history and the weighing of competing policies. No such judicial inquiry has been given the merits in this case. In fact, HUD elaborately controls every significant activity in the implementation of its federally-funded pro-

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[9] Petition for a Writ of Certiorari, A-10, A-81.

[10] For the Respondent Secretary of Housing and Urban Development, Page 9.

[11] Nash and Cibinic, **Federal Procurement Law** (George Washington Univ., 2d ed. 1969), page 339.

grams, even after contracting.[12] Contentions by HUD that forcing the agency to read the National Register and comply with Section 106 would cause "delay and serious administrative problems" would seem to require proof rather than simple assertion. In the final analysis the intention of Congress would control, notwithstanding an administrative burden, and no full judicial study of the relevant legislative materials has yet been made.

In summary, certiorari review by this Court should be granted in order that the merits receive careful study before the new federal law of historic preservation is congealed by judicial inattention.

CONCLUSION

For these reasons a writ of certiorari should issue.

Respectfully submitted

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Certificate of Service

I hereby certify that on this 30th day of March, 1970, copies of this Supplementary Petition for Certiorari were airmailed, postage prepaid, to each of the following Counsel for Respondents at their designated business addresses: Montjoy Trimble, Esq., Central Bank Building, Lexington, Kentucky 40507, Counsel for Urban Renewal and Community Development Agency of the City of Lex-

[12] See **Thorpe v. Housing Authority of Durham**, 393 U. S. 268 (1969). The citation in the Petition for Certiorari on p. 13, referring to similar HUD approvals in Urban Renewal projects should be corrected to read: Urban Renewal Handbook RHA 7214.1, ch. 4, § 4, page 1, 2/68 and Urban Renewal Handbook RHA 7209.1, ch. 4, § 3, page 2, 2/68.

ington, Robert E. Featherstone, Chairman, William R. Embry, Vice-Chairman, Byron Romanowitz, Member, D. C. Noble, Member, H. J. Hagler, Member, Jennie Bryant, Director; A. Gene Oliver, Esq., Citizens Union Bank Building, Lexington, Kentucky 40507, Counsel for Citizens Union National Bank and Trust Company, Inc.; A. B. Rouse, Esq., 141 North Upper Street, Lexington, Kentucky 40507, Counsel for J. Norwood Hodge and Norwood Construction Company, Inc.; Richard Smith, Esq., Municipal Building, Lexington, Kentucky 40507, Counsel for The City of Lexington, Kentucky, The Board of City Commissioners of the City of Lexington, Charles Wylie, Mayor, Joseph Graves, Member of the Board, Harry Sykes, Member of the Board, Fred Fugazzi, Member of the Board, Thomas Underwood, Member of the Board; and Eugene Siler, Esq., United States Attorney, Federal Building, Lexington, Kentucky 40507, Counsel for George Romney, Secretary of Housing and Urban Development; William D. Ruckelshaus, Esq., Assistant Attorney General, Civil Division, Room 3706, United States Department of Justice, Washington, D. C. 20530, Alan S. Rosenthal, Esq., and Alexander P. Humphrey, Jr., Esq., United States Department of Justice, Washington, D. C. 20530, Counsel for Respondent George Romney, Secretary of Housing and Urban Development, and to the Solicitor General, Department of Justice, Washington, D. C. 20530; and William Stanley, Jr., Covington & Burling, 888 16th Street, N. W., Washington, D. C. 20006, Counsel for the National Trust for Historic Preservation.

I further certify that all parties required to be served have been served.

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Jennie Bryant, respectfully pray that this Court not issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the Judgment and Opinion of the Court of Appeals entered therein on November 24, 1969.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Sixth Circuit, as yet unreported, appears as Appendix J, at pp. 63-79 of the Appendices.

The Opinion of the United States District Court for the Eastern District of Kentucky, which is unreported, appears as Appendix H, at pp. 49-61 of the Appendices.

JURISDICTION.

The jurisdiction of this Court is properly invoked by Petitioners under 28 U.S.C. § 1254(1) and the Petition was filed within ninety (90) days after the Judgment of November 24, 1969, of the United States Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED.

(1) Do historic preservation organizations and individuals who do not own properties listed on the National Register have standing in Federal Courts under either the National Historic Preservation Act of 1966 (PL 89-665, 16 U.S.C. § 470(f)) or the Administrative Procedures Act (5 U.S.C. § 702, or 704) to require the Secretary of Housing and Urban De-

velopment (hereinafter referred to as "HUD") to afford the Advisory Council on Historic Preservation an opportunity to comment on the impending demolition of such properties?

(2) Do individuals who own properties listed on the National Register of Historic Places have standing in Federal Courts under either the National Historic Preservation Act of 1966 or the Administrative Procedures Act to secure judicial review of an administrative decision of HUD which affects such properties?

(3) Does the National Historic Preservation Act of 1966 require HUD to afford the Advisory Council on Historic Preservation an opportunity to comment on the impending demolition of historic structures listed on the National Register of Historic Places when the expenditure of federal funds for the demolition of such structures was approved by HUD prior to such structures being listed on the National Register?

STATUTORY PROVISIONS INVOLVED.

5 U. S. C. § 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

* * * * * * * * *

5 U. S. C. § 702. Right of Review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub. L. 89-544, Sept. 6, 1966, 80 Stat. 392.

5 U. S. C. § 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.

42 U.S.C. § 1460. Definitions.

The following terms shall have the meanings, respectively, ascribed to them below, and, unless the context clearly indicates otherwise, shall include the plural as well as the singular number:

(a) "Urban renewal area" means a slum area or a blighted, deteriorated, or deteriorating area in the locality involved which the Secretary approves as appropriate for an urban renewal project.

(b) "Urban renewal plan" means a plan, as it exists from time to time, for an urban renewal project, which plan (1) shall conform to the general plan of the locality as a whole and to the workable program referred to in section 1451 of this title and shall be consistent with definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements; and (2) shall be sufficiently complete to indicate, to the extent required by the Secretary for the making of loans and grants under this subchapter, such land acquisition, historic and architectural preservation, demolition and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the urban renewal area, zoning and planning changes, if any, land uses, maximum densities, and building requirements.

(c) "Urban renewal project" or "project" may include undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight, and may involve slum clearance and redevelopment in an urban renewal area, or rehabilitation or conservation in an urban renewal area, or any combination or part thereof, in accordance with

such urban renewal plan. Such undertakings and activities may include—

"(1) acquisition of (i) a slum area or a deteriorated or deteriorating area, or (ii) land which is predominately open and which because of obsolete platting, diversity of ownership, deterioration of structures or site improvements, or otherwise, substantially impairs or arrests the sound growth of the community, or (iii) open land necessary for sound community growth which is to be developed for predominately residential uses, or (iv) air rights in an area consisting principally of land in highways, railway or subway tracks, bridge or tunnel entrances, or other similar facilities which have blighting influence on the surrounding area and over which air rights sites are to be developed for the elimination of such blighting influences and for the provision of housing (and related facilities and uses) designed specifically for, and limited to, families and individuals of low or moderate income, or if the area is found by the local public agency to be unsuitable for use for low or moderate income housing, for use for the development of industrial or educational facilities: *Provided,* That the requirement in subsection (a) of this section that the area be a slum area or a blighted, deteriorated or deteriorating area shall not be applicable in the case of projects under clauses (iii) and (iv) hereof: *Provided further,* That the aggregate amount of capital grants for projects under clause (iv) shall not exceed 5 per centum of the aggregate amount of grants authorized by this subchapter to be contracted for after September 2, 1964;

"(2) demolition and removal of buildings and improvements;

"(3) installation, construction, or reconstruction of streets, utilities, parks, playgrounds, and other improvements necessary for carrying out in the urban renewal area the urban renewal objectives of this subchapter in accordance with the urban renewal plan;

"(4) disposition of any property acquired in the urban renewal area (including sale, leasing or retention by the local public agency itself) at its fair value for uses in accordance with the urban renewal plan or as provided in section 1457 of this title;

"(5) carrying out plans for programs of code and enforcement or voluntary repair and rehabilitation of buildings or other improvements in accordance with the urban renewal plan;

"(6) acquisition of any other real property in the urban renewal area where necessary to eliminate unhealthful, unsanitary or unsafe conditions, lessen density, eliminate obsolete or other uses detrimental to the public welfare, or otherwise to remove or prevent the spread of blight or deterioration, to promote historic and architectural preservation, or to provide land for needed public facilities;

"(7) construction of foundations and platforms necessary for the provision on air rights designed specifically for, and limited to, families and individuals of low or moderate income, or construction of foundations and platforms necessary for the provision of air rights sites for the development of industrial or educational facilities;

"(8) acquisition and repair or rehabilitation for resale by the local public agency, of structures which are located in the urban renewal area and which, under the urban renewal plan, are to be repaired or rehabilitated for dwelling use or related facilities;

"(9) relocation within or outside the project area of structures which will be restored and maintained for architectural or historic purposes; and

"(10) restoration of acquired properties of historic or architectural value."

* * * * *

16 U.S.C. § 470. Congressional finding and declaration of Policy.

The Congress finds and declares—

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and

(d) that, although the major burdens of historic preservation have been borne and major efforts init-

iated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activties. Pub. L. 89-665, § 1, Oct. 15, 1966, 80 Stat. 915.

16 U. S. C. § 470 (f). Effect of Federal Undertakings upon property listed in the National Register; comment by Advisory Council on Historic Preservation.

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i-470m of this title a reasonable opportunity to comment with regard to such undertaking. Pub. L. 89-665, Title I. § 106, Oct. 15, 1966, 80 Stat. 917.

STATEMENT OF THE CASE.

The Petitioner, South Hill Neighborhood Association, Inc., is a non-profit corporation organized under and existing by virtue of the laws of Kentucky, having as one of its purposes the preservation of buildings. South Hill owns no property whatsoever and is solely an association.

The Petitioner, Curtiss Harrison, owns his home, located a few blocks from the Urban Renewal area, but does not own any property in the eighty (80) acre Urban Renewal area of the City of Lexington and does not own any of the buildings in question.

The Petitioners, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis, own properties in the Urban Renewal area and which are two (2) of the fourteen (14) buildings in question.

The Respondent, Urban Renewal, is a municipal corporation, organized under and existing by virtue of the laws of the Commonwealth of Kentucky, having all of the powers set forth in *Kentucky Revised Statutes* 99.330, *et seq.*

The Urban Renewal Agency of Lexington was properly formed by the City of Lexington, Kentucky in 1959, and in 1965, an Urban Renewal Plan was adopted by the Agency for an eighty (80) acre area in the heart of downtown Lexington. The Agency, on August 4, 1965, as required by law, held a public hearing on the Plan after publishing notices and mailing notices to the last known owner of each parcel of land in the project area. Notices were sent to the Peti-

tioner, Mrs. Stathis Kafoglis, and to the predecessors in title of the Petitioners, Mr. and Mrs. W. T. Dennis.

The 1965 Plan was subsequently approved by HUD and a Loan and Capital Grant Contract entered into between HUD and Urban Renewal on June 7, 1966. The 1965 Plan provided that all land in the project area would be used for commercial purposes and that all land to be acquired by the Agency *would be cleared of all improvements. The Loan and Capital Grant Contract approved the spending of federal funds for such purposes.* All of the fourteen (14) buildings which are the subject matter of this action were to be acquired and demolished by the Agency under the 1965 Plan.

In July of 1968, the Urban Renewal Plan was amended by the Agency. The Agency held a public hearing on the amended Plan after publishing notices and mailing notices to the last known owner of each parcel of land in the project area, including the Petitioners, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis.

The purpose of the 1968 amendment to the 1965 Plan was to provide for a Civic Center in an area bounded by Main, Patterson, High and Broadway Streets, and to provide for an alternate use for historic preservation in the north half of the 200 block of West High Street. Seven (7) of the buildings involved in this action were located on the north side of West High Street in the 200 block at the extreme northerly edge of the Urban Renewal area.

As a pre-requisite to historic preservation, the 1968 amended Plan provided that: (a) the seven (7) buildings, if allowed to remain, would be brought up to rehabilitation standards; (b) an acceptable plan, including financial, physical restoration and a time schedule, be presented to the Agency by a *bona fide* histric preservation organization obligating the owners to do the original restoration, continue the maintenance of the buildings, and acquire the buildings at fair market value, and (c) should the buildings not be restored, *they would be demolished* and the land redeveloped in commercial uses.

At the public hearing of July, 1968, the alternate use for historic preservation and the conditions therefor were explained to persons in attendance who were interested in historic preservation.

The 1968 amended Plan was subsequently approved by HUD *and the spending of federal funds for demolition of the buildings approved.*

In January of 1969, the Urban Renewal Plan was again amended by the Agency. The Agency held a public hearing on this amended Plan after publishing notices and mailing notices to the last known owner of each parcel of land in the project area, including the Petitioners, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis. The purpose of the second amendment was to provide for changes in the alignment of certain streets, however, this second amendment retained the alternate use for historic preservation for the seven (7) buildings in the 200 block of West High Street under the same conditions outlined in the 1968 amended

Plan. This 1969 amended Plan was approved by HUD on May 9, 1969, *and the spending of federal funds for demolition of the buildings approved.*[1]

Between July, 1968, and January, 1969, none of the Petitioners nor any historical preservation groups submitted any plan to the Agency whereby the buildings would be rehabilitated, maintained and acquired at their fair market value.

In April and May of 1969, the Agency, by public advertisement and other notices, invited public proposals for the reuse of a tract of the Urban Renewal property. The public advertisements inviting proposals stated that competition was to be based on proposed development and judged on a point system. The public advertisements also stated that:

> "Historic restoration is a permitted use for those properties fronting on High Street between Mill and Upper Street . . . . (the 200 block)
>
> * * * * * * *
>
> "All proposals for development of the property must be in accordance with the Urban Renewal Plan for Project Ky. R-63 and . . . must contain:
>
> 1. Offer to Purchase.
> 2. Redevelopers Statement of Qualifications and Financial Responsibility.
>
> * * * * * * *
>
> 7. An estimate of number of persons to be employed by building occupants.

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[1]This approval by HUD was two (2) months prior to the date that the buildings were listed on the National Register of Historic Places.

8. Good faith deposit of 10 percent of offered price in the form of a certified check or equivalent."

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On July 10, 1969, the same day set for the opening of reuse proposals, the fourteen (14) buildings were placed on the National Register of Historical Places as the "West High Street Historic District."[2]

On July 10, 1969, two (2) proposals for the reuse of the land had been submitted to the Agency, one by the Respondent Bank, the second by Historic Lexington, Incorporated. The proposal by the Bank was for a multi-story bank and office building to cost between $4,000,000.00 and $8,000,000.00, to employ One Thousand (1,000) persons, was accompanied by the required good faith deposit of Ten (10%) percent of the advertised price and otherwise complied with the Invitation for Proposals and Instructions to Bidders.

The proposal by Historic Lexington, Incorporated, one of the class which Petitioners purport to represent in this action, was not signed as required by the Instructions to Bidders, was not accompanied by the required good faith deposit and did not otherwise comply with the Invitations for Proposals and In-

[2]The integrity of the procedural steps taken by Petitioners to have the buildings listed on the National Register has been questioned by the Respondents in their Answer to the Complaint. The Respondents have avered that such listing was illegal because the procedural steps taken did not comply with Section 2.9 of "Grants For Historic Preservation, A Guide for State Participation," United States Department of the Interior, National Park Service, Office of Archaeology & Historic Preservation, January, 1969. (See Appendix K, pp. 80 to 102, of the Appendices and Appendix L, pp. 103 to 110 of the Appendices.)

structions to Bidders. The Agency notified Historic Lexington of the deficiencies in its proposal and gave them an opportunity to correct such deficiencies. As of the date of the filing of this action in the District Court, October 17, 1969, such deficiencies had not been corrected.

On *August 5, 1969,* official notice of the listing of the "West High Street Historic District" on the National Register was carried in 34 *Federal Register,* # 148, page 12723.

On September 3, 1969, the proposal of the Respondent Bank was accepted by the Agency, a Contract between the Bank and the Agency entered into, and on October 1, 1969, the Agency tendered deed to the Bank. The Contract between the Bank and the Agency required the land to be cleared of all improvements.

The Complaint of Petitioners was filed in the District Court on October 17, 1969. With the Complaint was filed a Motion for Temporary Restraining Order and the Affidavit of the Petitioner, Curtiss Harrison. The Motion for Temporary Restraining Order sought to restrain the Respondents from demolishing fourteen (14) buildings located on the north side of West High Street in Lexington, Kentucky. The District Court refused to enter the Restraining Order sought by the Petitioners on the ground that the Respondents had previously been restrained from demolishing the fourteen (14) buildings by the Fayette Circuit Court by an Order entered therein on October 16, 1969.

The action then pending in the Fayette Circuit Court had been filed on October 16, 1969, and the Re-

straining Order issued on October 16, 1969. In the State Court action the Respondents filed Motions to Dismiss on various grounds and on October 21, 1969, the State Court, after hearing the various Motions then pending, dismissed the action for failure to state a claim.

On October 21, 1969, the State Court entered an Order staying entry of the Judgment dismissing the State Court action until 5:00 P.M., October 22, 1969. On October 22, the Petitioners filed a Motion in the Kentucky Court of Appeals for Interlocutory Injunctive relief during the pendency of the appeal, and on the same day, the Kentucky Court of Appeals, sitting *en banc*, overruled Petitioners' Motion for Interlocutory Relief during the pendency of the appeal.

The District Court, after being informed by Counsel for Petitioners in the morning of October 22, that the Kentucky Court of Appeals would probably deny injunctive relief, set Petitioners' Motion for Temporary Restraining Order to be heard in Covington, Kentucky, at 4:30 P.M. on October 22. After hearing arguments of counsel, the District Court entered its Temporary Restraining Order.

On October 31, the District Court heard statements of counsel and evidence offered by the Petitioners, was of the opinion that there was no dispute as to the facts, ordered the case submitted on the record, and ordered the parties to file with the Court their requested Findings of Fact and Conclusions of Law.

On November 6, all Respondents, except HUD, filed their Answer. HUD chose to rely on its Motion to Dismiss.

As principal grounds for the District Court action, the Petitioners alleged that:

(1) The Respondents, Urban Renewal and HUD, did not comply with the provisions of § 106 of the National Historic Preservation Act of 1966, in that HUD failed to afford the National Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the impending demolition of the buildings; and

(2) The Petitioners' rights to due process were violated since decisions were made about demolition of the buildings without notice to the Petitioners and without giving Petitioners a reasonable opportunity to be heard.

On November 10, 1969, the Petitioners and Respondents filed their proposed Findings of Fact and Conclusions of Law with the District Court. On November 14, the District Court entered its Order: (a) dissolving the Temporary Restraining Order, (b) overruling Petitioners' Motion for Temporary Injunction, and (c) sustaining Respondents' Motion to dismiss the Complaint. The grounds upon which the District Court ruled were:

> "The plaintiffs contend that HUD failed to notify and give a reasonable opportunity for comment to the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. This, plaintiffs allege, violates 16 U.S.C. 470f and makes HUD (George Romney, Secretary) subject to mandamus action under

28 U.S.C. 1361 and subject to an injunction under 28 U.S.C. 1951. The plaintiffs further contend that the action of HUD would be reviewable under the administrative Procedures Act, 5 U.S.C. 701, *et seq.*

"Defendants deny these allegations and move the Court to dismiss the complaint for the reason that plaintiffs lack standing to raise the issues in controversy. This court holds that the plaintiffs lack standing.

"It is clear from the outset that plaintiffs do not have standing under the recent doctrine established by the Supreme Court in *Flast* v. *Cohen,* 392 U. S. 83 (1968). Plaintiffs have established neither a logical link between their taxpayer status and the type of legislative enactment attached nor a nexus between their taxpayer status and the precise nature of the constitutional infringement alleged. *Supra* at 102-3. It is clear, therefore, that plaintiffs do not have standing solely on the ground of being federal taxpayers." (See Appendix H, pp. 49-61 of the Appendices.)

The District Court further ruled that even if the Petitioners had standing to invoke the jurisdiction of the Court, dismissal of the Complaint would be in order, and said:

"It is the conclusion of the court, therefore, that the plaintiffs lack standing to sue. If it had been concluded that plaintiffs had standing to invoke the jurisdiction of this court, dismissal of plaintiffs' complaint would still be in order.

"If plaintiffs did have standing to bring this action, they could still not receive the relief they seek. The Lexington Urban Renewal Plan, Ky.

R-63, was first formulated in 1965 and was approved by HUD on June 7, 1966. At this time a 'Loan and Capital Grant Contract' was entered into between HUD and Lexington Urban Renewal Agency. This plan was first amended in July of 1968 and provided for demolition of the buildings or an alternate use of historic preservation. This amendment was approved by HUD on October 18, 1968. The plan was again amended in January of 1969. The amendment carried the same provision as the first concerning demolition or preservation. This second amendment was approved by HUD on May 8, 1969. All of these contracts between the Lexington Urban Renewal Agency and HUD provided for the expenditure of federal funds for demolition of the buildings. At none of these times did any buildings in the plan area appear on the National Register for Historic Places. HUD was, therefore, under no duty to notify the Advisory Council on Historic Preservation. Rumors of buildings with historic significance is not enough to require HUD to take this action. Placement on the Register is what is required.

"Based upon the loan and capital grant contracts, the Lexington Urban Renewal Agency sought proposals and bids for the property in question. These bids were to be submitted July 10, 1969. None of the plaintiffs submitted a proposal, but on the same day (July 10) placed the buildings on the National Register. Their contention that subsequent approval by HUD of demolition of some of these buildings without compliance with 16 U.S.C. 470f is without merit. 16 U.S.C. 470f and the duty contained therein refers only to times

when plans or amendments to plans are authorized and resulting loan and capital grant contracts are entered between HUD and local urban renewal agencies. Any other construction of the statute would place too great a burden on the urban renewal administrative process. See Judge Thornton's opinion in *Kent County Council for Historic Preservation* v. *George R. Romney,* Civil Action No. 6174 (W.D. Mich. October 2, 1969). Even if plaintiffs did have standing approval of the last amendment to the plan, Ky. R-63, was prior to the listing of the buildings on the National Register. Thus, 16 U.S.C. 470f imposed no duty on HUD to notify the Advisory Council on Historic Preservation.

"The issues heretofore resolved are dispositive of the case at bar. There is, therefore no need to consider other allegations made by the parties." (See Appendix H, pp. 49-61 of the Appendices.)

It is from this Order of the District Court that Petitioners, on November 17, 1969, appealed to the United States Court of Appeals for the Sixth Circuit. On November 24, 1969, the Court of Appeals, after both Petitioners and Respondents had filed briefs, sustained the Judgment of the District Court. It is from this Judgment that Petitioners seek the writ.

REASONS WHY WRIT SHOULD NOT BE GRANTED.

1. The Court of Appeals and District Court Properly Held That the Petitioners Have no Standing.

In 1966, Congress enacted the National Historic Preservation Act of 1966 (Pub. L. 89-665, 80 Stat. 915, 16 U.S.C. 470, *et seq.*). Congress found "that the spirit and direction of the Nation are founded upon and reflected in its historic past;" and "that the historical and cultural foundations of the Nation should be preserved. . . ." (16 U.S.C. 470(a) and (b)). To implement this policy Congress provided in Section 106 of the Act that:

> "The head of any Federal Agency having direct or indirect jurisdiction over a proposed . . . federally assisted undertaking in any State . . . shall, prior to the *approval of the expenditure of any Federal funds* on the undertaking . . . take into account the effect of the undertaking on any . . . building included in the National Register. The head of any such Federal Agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to the undertaking." (Emphasis supplied.)

Also, in 1966, Congress amended the National Housing Act of 1949, 42 U.S.C. 1460(b) and (c) to provide:

> "(b) 'Urban rewenal plan,' means a plan, as it exists from time to time . . . which plan . . .
>
> (c) (2) shall be sufficiently complete . . . *to indicate to the extent required by the Secretary* (of HUD) . . . such land acquisition, historical

> and architectural preservation, demolition . . . *as may be proposed* to be carried out in the urban renewal area. . . .'" (Emphasis supplied.)

To implement the 1966 Amendments to the Housing Act of 1949, the Secretary of HUD, on April 8, 1968, circulated its LPA Letter #452, which provided:

> "No property in the project area that is listed on the National Register shall be . . . demolished . . . without the prior concurrence of HUD. All such actions must be fully justified in *Part I of the Application for Loan and Grant or in subsequent project amendatories as appropriate.*" (Emphasis supplied.)

The Petitioners seek to enforce these statutes and regulations of HUD as "private attorneys general," invoking 28 U.S.C. 1651 (the All Writs Statute) and 28 U.S.C. 1361 (to compel an agency of the United States to perform a duty owed to the Petitioners by mandamus).[3]

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[3]It is interesting to imagine what would happen if a mandamus were issued to require HUD to invite the Advisory Council to comment. To so imagine is, of course, to set up a "straw man," however, HUD would invite the Advisory Council to comment with regard to the demolition. The Advisory Council might say that the buildings should not be demolished. HUD would say, as it has said in its Motion to Dismiss herein, "we have a binding contract with the local agency and have previously approved the demolition of these buildings." HUD would then direct the local Agency to proceed with the demolition. The Advisory Council would be powerless since the 1966 Act has no provisions for enforcement. For a Court to issue a mandamus, would therefore be doing a "useless thing." (See, *Mitchell v. Chambers Construction Co.*, 214 F. 2d 515 (CCA 10th 1954), at p. 517. "Equity will not do a useless or vain thing . . . the Court is fully justified in refraining from entering an empty decree.")

The Petitioners assert standing to bring this action under *Flast* v. *Cohen*, 392 U. S. 83, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968); *Powelton Civic Homeowners Ass'n* v. *Department of Housing and Urban Development*, 284 F. Supp. 809 (ED Pa. 1968); *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (CCA 2d, 1968); *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433 (ND Calif. 1968); *Scenic Hudson and Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (CCA 2d, 1965), cert. denied 384 U. S. 941, 86 S. Ct. 1462, 16 L. Ed 2d 540 (1966); *Nashville I-40 Steering Committee* v. *Ellington*, 387 F. 2d 179, cert. denied 390 U. S. 921, 19 L. Ed. 2d 982, 88 S. Ct. 857 (CCA 6th, 1967); *Hardin* v. *Kentucky Utilities*, 390 U. S. 1, 19 L. Ed. 2d 787, 88 S. Ct. 651 (1968); and *El Paso Natural Gas Co.* v. *FPC*, 386 U. S. 129, 17 L. Ed. 2d 814, 87 S. Ct. 932 (1967). These cases are distinguishable from the instant case.

Thus, in *Scenic Hudson*, the Federal Power Commission Act, around which that litigation centered contained a specific provision whereby aggrieved parties could obtain review of commission orders. Section 13(b) of the Federal Power Act, 16 U.S.C. § 825(1)(b) provided:

> "Any *party* to the proceeding under this Chapter *aggrieved* by any Order issued by the Commission in such proceedings may obtain a review of such Order in the United States Court of Appeals for any Circuit wherein the licensee or public utility to which the Order relates is located. . . ." (Emphasis supplied.)

The National Housing Act of 1949, as amended, contains no such provision and makes no mention of judicial review of any administrative action taken thereunder. Further, the Federal Power Commission, in *Scenic Hudson,* was under an affirmative statutory duty to give full consideration to alternative plans submitted to them.

Section 106 of the National Historic Preservation Act, 16 U.S.C. 470(f), requires that the head of any federal agency afford the Advisory Council on Historical Preservation an opportunity to *comment* with regard to its undertaking. The language of this act *places no affirmative duty* upon the Agency to give any consideration to such comments, if forthcoming. Thus, in the final analysis, the ultimate federal expenditure is *completely within the absolute discretion* of the head of the Federal Agency involved, in this case, HUD. Therefore, by the specific language of the Administrative Procedures Act, any acts of HUD in this respect are not reviewable since "committed to Agency discretion by law" (5 U.S.C. 701(a)(2)).

In *Norwalk Core* (395 F. 2d 920 (CCA 2d, 1968)), the District Court had held that the Plaintiffs therein had no standing to sue saying:

> "Neither may the three associations, as party to a class action seek redress on behalf of their members since they are not themselves members of the classes whose rights they claim to be asserting. It is fundamental that in a class action those who claim to represent the class be, themselves, members of the class. . . . Here, the associa-

tions make no claim of being objects of state action, nor did they claim deprivation of any rights in their individual capacities.

"Even if a class action were appropriate, the Plaintiffs have no standing to challenge the official conduct here in question. *Members of the public, whether living inside or outside a project area,* ordinarily have no standing to challenge planning of an Urban Renewal project . . . nor, by alleging civil rights violations, do they gain standing they would otherwise not have. . . . If residents of a project area cannot challenge a project while it is in the planning stages and before construction has begun, certainly they can have no standing to assert the same kind of challenge at a time when planning has been implemented, most of the land has been purchased and conveyed to the developers, and construction of new buildings has been almost completed." (*Norwalk Core, et al.* v. *Norwalk Redevelopment Agency, et al.*, 42 F.R.D. 617, at p. 622 (DC Conn. 1967).) (Emphasis supplied.)

The Circuit Court for the second circuit reversed the District Court on the grounds that the Complaint did state a cause of action for violation of the equal protection clause of the Fourteenth Amendment. The Complaint alleged that in planning and implementation of the Urban Renewal Project, the local Defendants did not assure or attempt to assure relocation for Negro and Puerto Rican displacees to the same extent that they did for whites. The Circuit Court did, however, affirm the District Court holding that to have

standing to sue, one must have a *personal stake* in the outcome of the litigation. The Court said:

> ". . . It is true that courts have been reluctant to interfere with Urban Renewal planning. The fact that the reasons for this reluctance have been lumped together under the rubric of 'lack of standing to sue' should not be allowed to obscure the distinction, necessarily albeit not altogether clear, between the propriety of allowing particular plaintiffs to bring litigation (there standing to sue) and the priority of judicial attempts to resolve the problems which the Plaintiffs are attempting to bring before the Court (the question of justiciability).
>
> "We consider first the issue of standing. The Court *will not, it is clear, entertain a suit by one who does not have some personal stake in the outcome of the litigation. . . .*
>
> "Even where a Plaintiff has a personal stake in the outcome of a case, he may be denied standing to sue on the ground that the right which he is attempting to assert is not one which the Courts will recognize. Thus, one cannot as a general matter object to governmental action on the basis that it aids ones competitors, for it is said that no legal wrong results from lawful competition. . . . This Court has, accordingly, refused to grant standing to Plaintiffs who object to urban renewal planning on this basis. *Taft Hotel Corporation* v. *H.H.F.A.*, 262 F. 2d 307; *Berry* v. *H.H.F.A.*, 340 F. 2d 939. . . .
>
> "The Plaintiffs in the case before us are in a very different position. *Their stake in the outcome of the case is immediate and personal,* and the

right which they allege has been violated—the right not to be subjected to racial discrimination in government programs—is one which the Courts will protect. Their standing to sue is clear. . . . (Emphasis supplied), (395 F. 2d 920, at p. 926, 927)."

In *Western Addition,* the action was brought on behalf of residents about to be displaced from their homes by construction of an urban renewal project. The Court, in giving Plaintiff standing to sue, cited *Powelton,* and said:

"In *Powelton Civic Home Owners Ass'n* v. *Department of Housing and Urban Development,* 284 F. Supp. 809 (E. D. Pa. 1968) the Civic Association and residents of an urban renewal area brought an action against the Secretary to enjoin disbursal of federal funds to the local redevelopment agency on the ground of absence of adequate relocation. The Court recognized the judicial reviewability of the Secretary's procedures under the Housing Act and also the standing of displaced residents to sue. On the subject of standing (pp. 820-828) the Court upon a review of the cases (including *Johnson,* supra), succinctly states its conclusion:

"'*The Plaintiff's economic interest in adequate relocation is obvious and beyond dispute.* The provisions of the Housing Act recognize and seek to protect that interest. The Secretary of HUD has allegedly acted in disregard of the plaintiff's recognized and protected interest. 'When a party seeks judicial relief from an injury inflicted by administrative action upon an

> interest recognized by statute, standing and review traditionally obtain.' * * * The Plaintiffs' theory of relief fits the traditional formula. Particularly where, as here, the gravamen of the plaintiffs' complaint is that the Secretary has failed to provide implicitly required procedural machinery, the court should not abandon its institutional responsibility for assuring the procedural due process of agency actions. In the absence of an explicit congressional mandate, we believe it inappropriate to abdicate that responsibility in this case * * * We have concluded that the relocation provisions of 42 U.S.C. § 1455 (c) (1) and (2), both in their substantive and in their procedural implications, are intended for the protection of these particular plaintiffs and do provide standing in this case' (Emphasis supplied), (294 F. Supp. 433, at p. 444)."

The case most nearly in point is *Harrison-Halstead*, where an Injunction was sought to prevent governmental agencies from proceeding with a plan to acquire and clear an area for use as a university campus. The Plaintiffs, following the adoption of the Urban Renewal Plan and in reliance thereon, relocated in adjacent areas with expectations of returning after redevelopment. As it turned out the redevelopment plan provided for clearance of the land to construct a university campus. The Court, in holding that the Plaintiffs had no standing to sue, said:

> "Nevertheless, and in spite of the outraged feelings of many people who have interests in this

area, we have in mind that *questions arising from the taking of property by condemnation for state purposes, are ordinarily matters for determination by the state courts.* The plaintiffs in this case have sought relief in a Federal Court. Whether they may properly do so depends principally on whether they have a standing to sue and whether a substantial federal question is involved.

"We think it is well settled that in a private suit in a federal court, where it is claimed that a substantial federal question is involved it must clearly appear that defendant's acts constituted the invasion of *plaintiffs' private legal rights. Frothingham* v. *Mellon,* 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078. In the Frothingham case a taxpayer brought a suit to enjoin expenditure of federal funds under a federal subsidy statute. The court said, page 488, . . . 'the party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'

* * * * *

"When a subsidy application is approved by the Administrator of HHFA, contracts are entered into by the agency and the local governmental body, here the Chicago Land Clearance Commission. Congress did provide certain standards to guide the Administrator in the exercise of his discretion. But, *such provisions and regulations thereunder do not confer legal rights upon plain-*

tiffs, as individuals, separate from their position as members of the general public.

* * * * *

"Plaintiffs argue that although the Housing Act says nothing about a judical review, Section 10 of the Administrative Procedures Act (5 U.S.C. § 1009), does so provide.

* * * * *

"We hold the plaintiffs herein do not have a right of judicial review of the agency action herein, pursuant to section 10 of the Administrative Procedures Act. (Emphasis supplied), (310 F. 2d 99, at p. 104, 105)."

Thus, it is respectfully concluded that the Petitioners herein have no standing to challenge the official conduct here in question. The standing of the Pettitioners is not elevated by the addition of Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis, who own two of the buildings in question within the Urban Renewal area of Lexington, since *neither Mrs. Kafoglis nor Mr. & Mrs. Dennis actually reside in the buildings.* Both buildings are now and have been for many years used as low rent "boarding" and "flop" houses.

As stated in *Norwalk Core:*

". . . Members of the public, whether living inside or outside a project area, ordinarily have no standing to challenge planning of an urban renewal project, . . . (42 F.R.D. 617 at p. 622)."

Further, even if there are irregularities in the adoption of the Urban Renewal Plan or in the conduct of

certain Agency members as is alleged in Petitioners' Complaint, such questions should be and have been raised in State Courts.[4]

As was said in *Harrison-Halstead:*

> "Nevertheless, and in spite of the outraged feelings of many people who have interests in this area, we have in mind that questions arising from the taking of property by condemnation for state purposes, are ordinarily matters for determination by the state courts. . . . (310 F.2d 99 at p. 103)"

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[4]The Complaint as amended alleges that "some members of the Agency . . . had . . . private financial interests in property located in the urban development area under K.R.S. 99.-350(7) . . . ." K.R.S. 99.350(7) prohibits any member of the agency from acquiring any property in the urban renewal area. It further provides, that if any agency member has a direct or indirect interest in any property in the urban renewal area, "he shall immediately disclose" such interest in writing. Failure to so disclose constitutes "misconduct in office." However, under K.R.S. 99.350(6) the sole penalty for misconduct in office is to make the Agency member subject to removal from office after a public hearing. Misconduct in office does not have the effect of altering or voiding the Urban Renewal Plan. (See Opinion of Fayette Circuit Court, December 24, 1969, pp. A-10 of Petitioners' Petition.)

The Complaint as amended further alleges that informal, special and regular meetings of the Agency were held without notice to the Petitioners. The Respondents are not aware of any requirements of law that any notices of any meetings of the Agency be given to members of the public except those meetings at which the Urban Renewal Plans were approved. These public meetings were properly noticed by newspaper advertisements and by mailed notices as required by K.R.S. 99.370(3). The notices of these meetings and the proceedings thereat complied with all due process requirements. (See, *Green Street Association* v. *Daley*, *infra*, wherein it was alleged that Plaintiffs were limited to reading a prepared statement, they were harassed and intimidated, denied the opportunity to cross-examine, and that the committee's conclusions were dictated in advance by the Defendants and persons unknown. The Court held, "no substantial federal question of due process is raised.")

Furthermore, no jurisdictional comfort is found for Petitioners under 5 U.S.C. § 702, § 703, or § 704 (the Administrative Procedures Act).

In *Green Street Association,* an action was filed by the Green Street Association, and 125 individual negro plaintiffs seeking a judicial review of an Urban Renewal Project in the area. The Court, in denying jurisdiction of the District Court, said:

> "Count II names both the local and the federal defendants. It alleges that at the public hearing on the Central Englewood Project, conducted by a committee of the Chicago City Council, the plaintiffs were limited to reading a prepared statement, that they were harassed and intimidated, and that they were denied the opportunity to cross-examine the defendants and the witnesses supporting the Project. Count II also alleges that the public notice required for the hearing was defective and that the committee's conclusions were dictated in advance by certain defendants or persons unknown. For these reasons it is asserted that the hearing did not conform to the requirements of section 105 (d) of the Housing Act of 1949, 42 U.S.C. § 1455 (d), and denied the plaintiffs due process. The plaintiffs seek to enjoin all defendants from proceeding to carry out the Project until a "full and fair public hearing on it has been held in compliance with law. * * *" For jurisdictional purposes, they rely on 28 U.S.C. § 1331 and section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009.
>
> "In Harrison-Halstead Community Group, Inc. v. Housing & Home Fin. Agency, supra, sim-

ilar claims of the inadequacy of a hearing were made, supported by the same jurisdictional allegations. As has already been stated, we held there that neither section 105 (d) of the Housing Act nor section 10 of the Administrative Procedure Act provides the basis for a federal right to judicial review of an urban renewal plan. We see no reason to reexamine our position in that case. Moreover, no substantial federal question of due process is raised. Rindge Co. v. Los Angeles County, 262 U. S. 700, 709, 43 S. Ct. 689, 67 L. Ed. 1186 (1923); Combs v. Illinois State Toll Highway Comm., 128 F. Supp. 305 (N.D. Ill. 1955). The district court properly dismissed Count II (373 F. 2d 1, at p. 7)."

In *South Suburban Safeway Lines,* the Plaintiff, who operated an intra state transit service, sought an Injunction to restrain the federal Defendants from granting any further funds to the local Defendants for the construction of a rapid transit system which would compete with the Plaintiff. The Court, in holding that the Plaintiffs had no standing to sue and denying jurisdiction under 5 U.S.C. § 702, said:

"In order for the plaintiff to show that it has standing, it must show that it has suffered, or will suffer in the future a 'direct injury,' i.e., a wrong which indirectly results in the violation of a legal right. Alabama Power Co. v. Ickes, 302 U. S. 464, 479, 58 S. Ct. 300, 82 L. Ed. 374 (1938). This 'legal right' may be a property right, a contractual right, a right protected against tortious invasion, or a right conferred by a statute or constitutional provision. Tennessee Electric Power Co. v. Ten-

nessee Valley Authority, 306 U. S. 118, 137, 59 S. Ct. 366, 83 L. Ed. 543 (1939). The plaintiff here claims that it has a right conferred on it by the Constitution or a statute, and that it has a property right under Illinois law.

"The Urban Mass Transportation Act, however, confers no express right on the plaintiff to sue in this court. In fact, there is no provision for judicial review at all. . . .

"The plaintiff, however, contends that there is an 'implied' right to sue under that Act. Because, the plaintiff argues, the statute mentions the need to co-ordinate private facilities with the overall plan for an urban transit system, this supplies the necessary 'implied' right to sue. *This contention is not well founded.* . . .

* * * * * * *

"Another statute which plaintiff argues gives it standing is Section 10 of the Administrative Procedure Act (A.P.A.), 5 U.S.C. § 702. That section provides:

> " 'A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.'

It is conceded, for the purpose of argument, that the plaintiff will be harmed sufficiently to be 'adversely affected or aggrieved by agency action.' There must be, however, a 'legal wrong' or harm which is 'within the meaning of a relevant statute.' Since the Urban Mass Transportation Act does not expressly or impliedly give standing to the plaintiff, the plaintiff must find another 'relevant

statute' which might give them a right to judicial review. Also see Harrison-Halstead Community Group, Inc. v. Housing and Home Finance Agency, supra, 310 F. 2d at 105. The only remaining 'relevant statutes' that could conceivably give the plaintiff standing are the Fifth and Fourteenth Amendments to the Constitution, which form the basis of plaintiff's argument that defendants' actions here violate the protections against deprivation of 'property' without due process of law. *It is clear to this court that the plaintiff must show that it was a victim of some 'legal wrong' or that it was deprived of 'property' without due process, in order to come within the A.P.A. provisions.* But this is the same inquiry that the *Alabama Power* case, supra, requires. It therefore appears to this court that plaintiff's claim to standing rises or falls with the scope of the 'property right' given to the plaintiff as a holder of a certificate of public convenience and necessity.

* * * * * * *

"Since it does not appear that the Plaintiff has the requisite standing, this suit must be dismissed for lack of jurisdiction . . . ." (285 F. Supp. 676, at pp. 678-681). (Emphasis supplied.)

2. Even if the Petitioners Have Standing, the Judgments of the District Court and Court of Appeals are Sustainable on the Merits, Since the National Historic Preservation Act Is Not Applicable Under the Facts.

Section 106 of the Act requires HUD to seek the comments of the National Council "prior to the approval of the expenditure of any federal funds on the undertaking . . . ." The 1965 Urban Renewal Plan of the City of Lexington contemplated the acquisition and demolition of the buildings in question and was approved by HUD prior to July 10, 1969. The 1968 amended Plan likewise contemplated the acquisition and demolition of the buildings in question and was approved by HUD prior to July 10, 1969. The 1969 amended Plan likewise contemplated the acquisition and demolition of the buildings in question and the approval of HUD of that Plan was on May 8, 1969.

Petitioners rely on LPA letter # 452, and Urban Renewal Handbook, RHA 7207.1 (3/27/69) which provide that:

> "No property in the project area that is listed on the National Register shall be . . . demolished . . . without the prior concurrence of HUD."

However, LPA Letter # 452 and RHA 7207.1 further provide:

> "All such actions must be fully justified in Part I of the Application for Loan and Grant or *in subsequent project amendatories as appropriate.*" (Emphasis supplied.)

This language, contemplates local Agency justification of the demolition of buildings listed on the National Register *only if an urban renewal plan is formulated or amended after properties are listed on the National Register.* The buildings in question were listed on July 10, 1969. The Lexington Urban Renewal Plan has not been amended since that date.

3. Even if the Petitioners Have Standing and the National Historic Preservation Act Is Applicable Under the Facts, the Petitioners Have Waived Any Rights They May or Might Have and Are Barred From Enforcing Any Such Rights.

Any rights the Petitioners might have under either the National Historic Preservation Act or the Housing Act of 1949 are barred and have been waived by the Petitioners. That the buildings in question might have some historical significance was taken into consideration by the local agency in its 1968 Urban Renewal Plan and the Plan of 1969. Both provided for an alternate use for historical preservation of the buildings in question. Such use, however, was conditioned upon the groups interested in historical preservation presenting a feasible plan for the restoration, preservation and maintenance of the buildings.

Yet, from June of 1968, to the date hereof, none of the Petitioners nor any of the class which they purport to represent have presented any such plan to the local Agency. On July 10, 1969, a proposal was submitted by Historic Lexington, Incorporated, a member of the class which Petitioners purport to represent, but such

proposal was incomplete and did not comply with the requirements of the Invitation for Proposals or the Instructions to Bidders. Historic Lexington was given an opportunity to correct these deficiencies, but to date has failed. Thus, in reliance upon the failure of the Petitioners and their class to propose a feasible plan for the restoration, maintenance and operation of the buildings in question, the Agency has entered into contracts with various parties for the sale of the land. The Petitioners, after a delay of many months sought to have the state and federal courts set aside contracts of sale and otherwise upset and destroy the Urban Renewal Plan of the City of Lexington.

CONCLUSION.

Thus, it is respectfully concluded that this Court should not issue a Writ of Certiorari to the Court of Appeals, because:

(1) The Petitioners have no standing or capacity to bring the action.

(2) The Respondents have not violated the provisions of Section 106 of the National Historic Preservation Act of 1966, and

(3) The enforcement of any rights that Petitioners may or might have are barred and have been waived.

Respectfully submitted,

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Counsel for the Respondents,
The City of Lexington, Kentucky, Charles Wylie, Joseph Graves, Harry Sykes, Fred Fugazzi, Thomas Underwood, Urban Renewal and Community Development Agency of the City of Lexington, Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble, H. J. Hagler, and Jennie Bryant.

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CERTIFICATE OF SERVICE.

I, J. Montjoy Trimble, Attorney for the Respondents, The City of Lexington, Kentucky, Charles Wylie, Joseph Graves, Harry Sykes, Fred Fugazzi, Thomas Underwood, Urban Renewal and Community Development Agency of the City of Lexington, Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble, H. J. Hagler, and Jennie Bryant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30 day of March, 1970, I served copies of the foregoing Brief of Certain Respondents in Opposition to Petition for a Writ of Certiorari, together with copies of the Appendices to the Brief of Respondents in Opposition to Petition for a Writ of Certiorari on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530.

2. On the Department of Housing and Urban Development, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its General Counsel, at his office, Washington, D. C. 20510.

3. On the Respondent, Citizens Union National Bank & Trust Company, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its attorneys of record, A. Gene Oliver of Strother, Oliver & Strother, Citizens Union Bank Building, Lexington, Kentucky 40507.

4. On the Respondents, J. Norwood Hodge and Norwood Construction Company, Inc., by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record, A. B. Rouse of Fowler, Rouse,

Measle & Bell, 141 North Upper Street, Lexington, Kentucky 40507.

5. On the Petitioners, South Hill Neighborhood Association, Inc., Curtiss Harrison, Mrs. Stathis Kafoglis and Mr. & Mrs. W. T. Dennis, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record, Eugene F. Mooney, University of Kentucky, College of Law, Lexington, Kentucky 40506, John E. Kennedy, University of Kentucky, College of Law, Lexington, Kentucky 40506, and Roger B. Sledd, 1404 First National Bank Building, Lexington, Kentucky 40502.

I further certify that all parties required to be served have been served.

J. Marbury Breckinridge

Counsel for Respondents,
The City of Lexington, Kentucky, Charles Wylie, Joseph Graves, Harry Sykes, Fred Fugazzi, Thomas Underwood, Urban Renewal and Community Development Agency of the City of Lexington, Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble, H. J. Hagler, and Jennie Bryant.

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APPENDIX "A"

FAYETTE CIRCUIT COURT

DIVISION No. ____

Civil Action No. 25992

SOUTH HILL ASSOCIATION, INC., a non-profit incorporated corporation of Kentucky; and Curtiss Harrison; and on behalf of themselves and other taxpayers, property owners and historic preservation groups and persons similarly situated, - - - - - - - - - *Plaintiffs,*

v.

LEXINGTON URBAN RENEWAL AND COMMUNITY DEVELOPMENT COMMSSIION, ROBERT E. FEATHERSTON, Chairman; WILLIAM R. EMBRY, Vice-Chairman; BYRON ROMANOWITZ, Member; D. C. NOBLE, Member; H. J. HAGLER, Member; JENNIE BRYANT, Acting Director of the Lexington Urban Renewal and Community Development Commission; CITIZENS UNION NATIONAL BANK, INC., a Kentucky Corporation; NORWOOD CONSTRUCTION COMPANY, a Kentucky Corporation, and J. NORWOOD HODGE, President of Norwood Construction Company, - - - *Defendants.*

COMPLAINT—Filed October 16, 1969.

Comes the Plaintiff and for its cause of action states:

1. Plaintiffs are the South Hill Neighborhood Association, Inc., a non-profit corporation composed of 500 members with Offiecs in Lexington, Curtiss Harrison,

341 Madison Place, Lexington, Kentucky, President of the South Hill Neighborhood Association.

2. Defendants are the Lexington Urban Renewal and Community Development Commission, a public body under KRS 99.330 et. seq., Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble, H. J. Hagler, all members of the Commission, Jennie Bryant, Acting Director of the Commission, and Norwood Construction Company, Lexington, Kentucky, and J. Norwood Hodge, President.

3. Defendants by formal action on October 14, 1969 have entered into a certain demolition contract whereby Norwood Construction Company is obligated to immediately raze and destroy certain buildings taken for a public purpose by the Commission which are located on the south one-half of the 200 and 300 blocks of High Street, Lexington, Kentucky, and which are registered as a Historic District on the National Register of historic places established under the National Historic Preservation Act of 1966 and maintained by the Department of Interior, National Park Service. Said contract was executed by the Commission in violation of the provisions of KRS 99.330 et. seq., the Housing Act of 1949 as amended and the National Historic Preservation Act of 1966, Public Law 89-665. Specifically, the Commission in executing the demolition contract to the detriment of the health, safety, and welfare of the people of the Commonwealth exceeded its powers under KRS 99.360(1)(a) and (b) and KRS 99.330(2)(a) and (b).

4. The Commission has ordered the immediate demolition of the buildings and Plaintiff is informed and believes that Norwood Construction Company intends and expects to enter upon the land and commence de-

struction of the buildings on October 16, 1969, unless sooner restrained.

5. Plaintiff is challenging the validity of this Commission action in a suit for injunction in the Federal District Court but due to the temporary physical absence of both federal District Judges from the City of Lexington, is unable to bring before that Court its motion for Temporary Restraining Order restraining defendants from destroying the buildings before the buildings are destroyed under the contract herein, thereby mooting plaintiff's case under both state and federal law, destroying the jurisdiction of the court, and causing irreparable injury to Plaintiff for which no adequate remedy at law exists, all of which more fully appears in the Affidavit of Curtiss Harrison attached hereto.

Wherefore, Plaintiff prays this Court issue its order temporarily and permanently restraining all defendants from proceeding under the demolition contract and further issue its mandamus to the defendant public officials to vacate their formal action executing the contract.

(s) Eugene F. Mooney,
Attorney for Plaintiff,
College of Law,
University of Kentucky.

APPENDIX "B"

FAYETTE CIRCUIT COURT

FIRST DIVISION

No. 25992

SOUTH HILL ASSOCIATION, INC., ET AL., - *Plaintiffs,*

v.

URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, ET AL., - - - - - - - - *Defendants.*

ANSWER AND COUNTERCLAIM.

Come the Defendants, Urban Renewal and Community Development Agency of the City of Lexington, a Municipal corporation (hereinafter sometimes referred to as "Urban Renewal"), Robert E. Featherston, Byron Romanowitz, D. C. Noble, H. J. Hagler, Jennie Bryant, and Citizens Union National Bank and Trust Company, Inc., a Kentucky corporation (all these Defendants hereinafter referred to sometimes as the "Defendants") and for their Answer to the Complaint and Amended Complaint of the Plaintiffs state as follows:

FIRST DEFENSE.

The Complaint and Amended Complaint fail to state a claim upon which relief can be granted.

SECOND DEFENSE.

The Complaint and Amended Complaint should be dismissed on the ground that the City of Lexington, a munic-

ipal corporation validly existing and duly organized under the Laws of the Commonwealth of Kentucky, is an indispensable party to this action.

THIRD DEFENSE.

The Complaint and Amended Complaint should be dismissed on the ground that the Plaintiffs are not the real parties in interest and have no standing or capacity to bring this action.

FOURTH DEFENSE.

(1) The Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 1 of the Complaint and therefore deny such averments.

(2) The Defendants admit that the averment contained in paragraph 2 of the Complaint and Amended Complaint that Urban Renewal is a municipal corporation validly existing and duly organized under Chapter 99 of *Kentucky Revised Statutes*. The Defendants admit the averment contained in paragraph 2 of the Complaint that the Defendants, Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble and H. J. Hagler are members of Urban Renewal, a municipal corporation. The Defendants admit the averment contained in paragraph 2 of the Complaint that Jennie Bryant is the acting Director of Urban Renewal. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the remainder of the averments contained in paragraph 2 of the Complaint and Amended Complaint and therefore deny such averments.

(3) The Defendants admit the averment contained in paragraph 3 of the Complaint and Amended Complaint that on October 14, 1969, Urban Renewal entered into a valid Contract with Norwood Construction Company, whereby Norwood was to demolish certain buildings owned in fee simple by Urban Renewal. The Defendants are without

sufficient knowledge or information to form a belief as to the averment contained in paragraph 3 of the Complaint and Amended Complaint that the south one-half of the 200 and 300 blocks of High Street, Lexington, Fayette County, Kentucky, are registered as historic districts on the National Register of Historic Places, established under the National Historic Preservation Act of 1966, Public Law 89-665. The Defendants deny each and every other averment contained in paragraph 3 of the Complaint and Amended Complaint.

(4) The Defendants admit the averment contained in paragraph 4 of the Complaint that Urban Renewal has ordered Norwood to demolish certain buildings owned in fee simple by Urban Renewal located on the 200 and 300 blocks of High Street, Lexington, Fayette County, Kentucky. The Defendants do not have sufficient information or belief to either admit or deny the remainder of the averments contained in paragraph 4 of the Complaint and therefore deny such averments.

(5) The Defendants deny each and every averment contained in paragraph 5 of the Complaint.

FIFTH DEFENSE.

The Complaint and Amended Complaint should be dismissed because the Plaintiffs are guilty of laches, estoppel, and have waived any rights they may or might have under law in that:

(1) Prior to July 10, 1969, Urban Renewal invited proposals from the public for the redevelopment of a parcel of land fronting on High Street, Upper Street, Vine Street and Mill Street in the City of Lexington, Fayette County, Kentucky.

(2) On or about July 10, 1969, an entity known as Historical Lexington, Incorporated, submitted a proposal for the preservation and restoration of a portion of the 200 block of West High Street.

(3) The proposal of Historical Lexington, Incorporated did not comply with the "Instruction to Bidders," attached to and made a part of the inivitation for proposals for the redevelopment of such land theretofore issued by Urban Renewal.

(4) The Plaintiffs did not respond to the invitation for proposals of Urban Renewal and did not submit a proposal for the redevelopment of such land, a portion of which is the subject matter of this action.

COUNTERCLAIM.

Come the Defendants and for their Counterclaim against the Plaintiffs, South Hill Association, Inc. and Curtiss Harrison, and the Surety on the Bond of the Plaintiffs, Jane Townsend, state as follows:

(1) The Restraining Order issued by this Court on or about October 16, 1969, was illegal and wrongful.

(2) As a result of the illegal and wrongful restraining of the Defendants, the Defendants have incurred and suffered and will incur and suffer costs and damages in excess of $1,000,000.00, such cost and damages including attorneys' fees, loss of profits, loss of income, and loss of bids and proposals for the redevelopment of certain lands owned in fee simple by Urban Renewal situated in the vicinity of the lands which are the subject matter of this action.

Wherefore, the Defendants demand Judgment against the Plaintiffs, South Hill Association, Inc. and Curtiss Harrison, and Jane Townsend, Surety on the Bond of Curtiss Harrison, as follows:

(1) For damages in the amount of $1,000,000.00,

(2) that the Complaint and Amended Complaint of the Plaintiffs be dismissed and held for naught,

(3) that no Injunction be issued herein enjoining and restraining the Defendants from any acts, including the demolition and destruction of that real property owned in

fee simple by the Defendant, Urban Renewal, on High Street in Lexington, Fayette County, Kentucky,

(4) for their cost herein expended, and

(5) for such other and further relief as the Court may deem to be equitable and just.

Kincaid, Wilson, Schaeffer,
Trimble & Hembree,

(s) J. Montjoy Trimble,
Attorney for Defendants, Urban Renewal and Community Development Agency of the City of Lexington, a Municipal Corporation, Robert E. Featherston, Chairman; Byron Romanowitz, Member; D. C. Noble, Member; H. J. Hagler, Member; and Jennie Bryant, Acting Director of the Urban Renewal and Community Development Agency of the City of Lexington,

500 Central Bank Building,
Lexington, Kentucky 40507

Strother, Oliver & Strother,

(s) A. Gene Oliver,
Attorneys for Defendant, Citizens Union National Bank and Trust Company, Inc., a Kentucky Corporation,

Citizens Union Bank Building,
Lexington, Kentucky 40507

CERTIFICATE.

I certify that the foregoing Answer and Counterclaim has been served by delivering a true copy thereof to Eugene

F. Mooney, Attorney for the Plaintiffs, University of Kentucky, College of Law, Lexington, Kentucky, and to Arthur B. Rouse, Jr., Fowler, Rouse, Measle & Bell, Attorney for the Defendants, Norwood Construction Company, and J. Norwood Hodge, President of Norwood Construction Company, 141 N. Upper Street, Lexington, Kentucky, this 20th day of October, 1969.

(s) J. Montjoy Trimble.

APPENDIX "C"

FAYETTE CIRCUIT COURT

FIRST DIVISION

No. 25992

SOUTH HILL ASSOCIATION, INC., ET AL., - *Plaintiffs,*

v.

URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, ET AL., - - - - - - - *Defendants.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The plaintiffs in this action are Curtiss Harrison and the South Hill Neighborhood Association, Inc., a non-profit corporation composed of members interested in the preservation of certain areas in the City of Lexington. The plaintiffs have instituted this action against the Lexington Urban Renewal and Community Development Commission.

The Urban Renewal Commission has acquired certain property within the City of Lexington, including the block fronting on West High Street between Upper and Mill Streets. The Urban Renewal Commission has entered into an agreement with the defendant, Citizens Union National Bank & Trust Company, which proposes to erect a new modern bank building on the block. Pursuant to its agreement with the Citizens Union National Bank & Trust Company, the Urban Renewal Commission has entered into a contract with the defendant, Norwood Construction Company, for the demolition of all buildings on the south side of High Street between Upper and Mill Streets. The president of the Norwood Construction Company is also joined as a defendant.

The buildings to be demolished included some of the oldest buildings now standing within the City of Lexington. These buildings are of significant historical value. Because of their historic, architectural and cultural significance, fourteen buildings located on the north side of West High Street between Limestone and Broadway (including the buildings in issue here) have been listed in the National Register of Historic Buildings established by the National Historical Preservation Act of 1966, 16 U.S.C.A., Section 470a. The National Historical Preservation Act of 1966 also creates an Advisory Council on Historic Preservation, 16 U.S.C.A., Section 470i. Under Section 106 of the National Historical Preservation Act of 1966, a federal agency must take into account any building included in the National Register which would be affected by any project involving an expenditure of federal funds. In addition, the federal agency must also afford the Advisory Council a reasonable opportunity to comment with regard to the undertaking. 16 U.S.C.A., Section 470f.

The present urban renewal plan of the Urban Renewal Commission involves the expenditure of federal funds and was also subject to approval by the Department of Housing and Urban Development (HUD). The plaintiffs assert that HUD has violated the National Historical Preservation Act of 1966 by failing to afford the Advisory Council an opportunity to comment on the destruction of the buildings in question pursuant to the defendants' urban renewal plan.

This action was commenced on October 16, 1969, at which time plaintiffs obtained a temporary restraining order for the purpose of preventing the defendants from proceeding with the demolition of the ancient buildings. The complaint alleged that the plaintiffs were filing an action against HUD and its officials in the United States District Court for the Eastern District of Kentucky for the purpose of enjoining the demolition of the buildings in question. The complaint alleged that neither of the Federal District

Judges for the Eastern District of Kentucky were available and that the defendants would accomplish the demolition of the buildings before plaintiffs were able to secure a hearing in Federal Court. The plaintiffs sought the intervention of this court to preserve the buildings in question until the Federal Court could act. There is nothing in the record in this case to indicate the pendency of any action in Federal Court. However, from statement of counsel, which was not disputed, it appears that an action was commenced in Federal Court on October 17, 1969, that a motion for a temporary restraining order was presented to Judge Swinford on October 20th, and that Judge Swinford will rule on the matter at the call of the Lexington Docket on October 27th.

A hearing was held on the plaintiffs' motion for a temporary injunction on October 20, 1969. At this hearing, no oral testimony was offered. All parties submitted the issue on the affidavits in the record.

On October 14, 1969, at an evening meeting, the Urban Renewal Commission accepted the bid of the defendant, Norwood Construction Company, for the demolition of the buildings in question. During the day of October 15, 1969, the Urban Renewal Commission was informed that the plaintiffs would seek to enjoin the demolition of the buildings. Norwood Construction Company commenced destruction of the buildings that evening and continued spasmodically until service of a restraining order and an amended restraining order were served the morning of October 16th. Unless restrained, the defendants will continue with the complete demolition of the buildings and thereby destroy forever whatever value they may possess.

As a citizen and taxpayer of the City of Lexington, Curtiss Harrison has standing to question whether the members of the Urban Renewal Commission are proceeding in violation of any statutory law of the state. Ky. Utilities Co v. Ginsberg, 255 Ky. 148, 72 S. W. 2d 738; Weller

v. McCauley, 383 S. W. 2d 356. While the Court has some question as to the right of the South Hill Association to prosecute this action on behalf of its members or other citizens and taxpayers of the city, the Court need not decide this question since it does conclude that Curtiss Harrison is a proper plaintiff.

Even though the plaintiff, Harrison, has standing to prosecute this action, it does not follow that this Court can substitute its judgment for that of the Urban Renewal Commission. Whether or not these buildings should be preserved for their historic value or whether the interests of the City of Lexington can best be promoted by the erection of a new bank building, are not questions which call for a judicial decision. These decisions involve the exercise of the legislative and executive power by the Commission which is a body politic exercising governmental functions. Under our form of government which provides for the separation of powers, this Court can exercise only judicial powers. American Beauty Homes v. Louisville, 379 S. W. 2d 450. This Court cannot determine whether the demolition of the buildings is wise or folly. The Court can only consider whether the Urban Renewal Commission has exceeded its powers or has failed to follow the statutory procedure for the enactment of an urban renewal plan. Dinwiddie v. Urban Renewal & Community Development Agency, 393 S. W. 2d 872; Scenic Hudson Preservation Conf. v. Federal Power Com'n., 354 F. 2d 608, at 620; Powelton Civic Home Owners Ass'n. v. Dept. of Housing & Urban Dev., 284 F. Supp. 809, at 818-820, 829-832.

Urban renewal necessarily affects older buildings, and KRS 99.360(1)(d) expressly authorizes the Commission to clear any and all buildings from any real property acquired by it. KRS 99.370 sets forth the prerequisites for the adoption of an urban renewal plan. Unlike the National Historical Preservation Act of 1966, the Kentucky urban renewal act does not attempt to provide for the preservation

of buildings of historical interest. Nowhere in the case are any facts which could indicate that the Urban Renewal Commission is exceeding its powers or failed to follow the statutory procedures for the acquisition and development of the land in question.

Even if HUD and the federal officials have violated Section 106 of the National Historical Preservation Act of 1966, any such violation of federal law involves only federal officials. The National Historical Preservation Act of 1966 applies only to federal agencies. The failure of HUD to afford the Advisory Council an opportunity to comment on the destruction of these buildings which appear in the National Register does not give rise to a cause of action against these local defendants.

Courts have, on occasion, exercised equity jurisdiction for the purpose of preserving the subject matter of an action pending in another court. See, 42 Am. Jur. 2d, Injunctions, Section 12; 43 C.J.S., Injunctions, Section 13. While this Court does not have the benefit of the record in the federal action, it does appear that the matter is presently pending before Judge Swinford. This Court knows of no reason why Judge Swinford cannot protect the subject matter of the Federal Court action by the issuance of a restraining order or temporary injunction. Whatever necessity existed on October 16th for this Court to preserve these buildings until the matter could be brought before the proper judge in the United States District Court, that necessity no longer exists.

Therefore, it is the conclusion of the Court that the plaintiffs' motion for a temporary injunction should be denied, and that plaintiff's complaint as amended should be dismissed for failure to state a claim upon which relief can be granted against the defendants.

There remains a counterclaim which has been filed by the defendants to which a responsive pleading is not due. In addition, there is a motion for a rule to issue against the

defendants, Norwood Construction Company and Norwood Hodge, to show cause why they should not be punished for contempt for proceeding with demolition work after being served with the temporary restraining order in the case. The fact that the original restraining order described the property as being 200 West High Street rather than the 200 block of West High Street does not necessarily dispose of this issue. An injunction must not be construed literally to the point of absurdity, and compliance with the strict letter of the injunction is not enough if there is violation of its obvious spirit. Wormald v. Macy, 349 S. W. 2d 199. Therefore, the rule should issue to show cause why they should not be punished for contempt.

While these matters remain to be determined, the order dismissing the plaintiffs' complaint should, pursuant to CR 54.02, recite that there is no just reason for delaying the finality of that order.

This opinion shall constitute the Court's Findings of Fact and Conclusions of Law required by CR 65.03(5). The Clerk will make this opinion a part of the record and the attorneys will prepare an order and judgment in conformity herewith. The temporary restraining order heretofore issued by the Court shall be dissolved upon the entry of said order and judgment.

(s) James Park, Jr.,
Judge.

October 21, 1969.

Copies to:

Attorney for Plaintiffs:
Hon. Eugene Mooney.

Attorney for Defendant,
Urban Renewal Commission,
Hon. Montjoy Trimble.

Attorney for Defendant,
Norwood Construction Company,
Hon. A. B. Rouse.

APPENDIX "D"

FAYETTE CIRCUIT COURT

FIRST DIVISION

No. 25992

SOUTH HILL ASSOCIATION, INC., ET AL., - *Plaintiffs,*

v.

URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, ET AL., - - - - - - *Defendants.*

JUDGMENT.

This matter came on for hearing before this Court on Monday, October 20, 1969, at 2:30 P.M. in open Court on: (a) Plaintiff's Motion for a Temporary Injunction, (b) Defendants' Motions to Dismiss on various grounds, and (c) Defendants' Motions to dissolve the Temporary Restraining Order and the Amended Temporary Restraining Order previously granted herein on October 16, 1969. The Court having considered arguments of counsel, being sufficiently advised, and having entered therein its Findings of Fact and Conclusions of Law, it is Ordered:

(1) That the Plaintiff's Complaint as amended be and the same is hereby dismissed,

(2) The Plaintiff's Motion for a Temporary Injunction be and the same is hereby overruled.

(3) That a rule issue requiring the Defendants, J. Norwood Hodge and Norwood Construction Company, to show cause why they should not be punished for contempt.

(4) The Counterclaim of certain Defendants is not dismissed and is retained on the docket for further proceedings in accordance with applicable law.

This is a final judgment insofar as the plaintiffs' cause of action is concerned and there is no just reason for delay.

Entered this 21st day of October, 1969.

(s) James Park, Jr.,
Judge, Fayette Circuit Court,
First Division.

To Be Entered,
Notice of Entry Waived:
(s) J. Montjoy Trimble

J. Montjoy Trimble,
Attorney for Defendants, Urban Renewal and Community Development Agency of the City of Lexington, a Municipal Corporation, Robert E. Featherston, Chairman; Byron Romanowitz, Member; D. C. Noble, Member; H. J. Hagler, Member; and Jennie Bryant, Acting Director of the Urban Renewal and Community Development Agency of the City of Lexington,
(s) A. Gene Oliver

A. Gene Oliver,
Attorney for Defendant, Citizens Union National Bank and Trust Company, Inc., a Kentucky Corporation,
(s) Roger Sledd

Roger Sledd,

Of Counsel for the Plaintiffs, South Hill Association, Inc. and Curtiss Harrison,

(s) Arthur B. Rouse, Jr.

Arthur B. Rouse, Jr.,

Attorney for Defendants, Norwood Construction Company and J. Norwood Hodge, President of Norwood Construction Company.

APPENDIX "E"

COURT OF APPEALS OF KENTUCKY

SOUTH HILL ASSOCIATION, INC., and
CURTIS HARRISON, - - - - - - *Appellants,*

v.

URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, ET AL., - - - - - - - - - *Appellees.*

ORDER—Entered October 22, 1969.

After hearing oral argument by counsel for the appellants and the appellees, the court is of the opinion that appellants' motion for injunctive relief under Civil Rule 65.08(1) is overruled.

Entered this October 22, 1969.

(s) Edw. P. Hill, Jr.,
Chief Justice.

APPENDIX "F"

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
(LEXINGTON)

Civil Action #2080

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., a nonprofit incorporated association of the Commonwealth of Kentucky; THE BLUEGRASS TRUST FOR HISTORIC PRESERVATION, INC., a nonprofit incorporated association of the Commonwealth of Kentucky; CURTIS HARRISON; MRS. STATHIS KAFOGLIS; MR. & MRS. W. T. DENNIS; on behalf of themselves and all other United States or Kentucky citizens, taxpayers, property owners, or historic preservation groups and persons similarly situated, - - - - - - *Plaintiffs,*

v.

GEORGE ROMNEY, Secretary of the United States Department of Housing and Urban Development,

THE CITY OF LEXINGTON, KENTUCKY; HONORABLE CHARLES WYLIE, Mayor of the City of Lexington; THE BOARD OF CITY COMMISSIONERS OF THE CITY OF LEXINGTON; JOSEPH GRAVES, Member of the Board; HARRY SYKES, Member of the Board; THOMAS UNDERWOOD, Member of the Board; FRED FUGAZZI, Member of the Board; URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, a municipal corporation; ROBERT E. FEATHERSTON, Chairman; WIL-

LIAM R. EMBRY, Vice-Chairman; BYRON ROMANOWITZ, Member; D. C. NOBLE, Member; H. J. HAGLER, Member; JENNIE BRYANT, Director of the Urban Renewal and Community Development Agency of the City of Lexington,

CITIZENS UNION NATIONAL BANK AND TRUST COMPANY, INC., a Kentucky corporation; NORWOOD CONSTRUCTION COMPANY, INC., a Kentucky corporation; J. NORWOOD HODGE, President of Norwood Construction Company, - - *Defendants.*

AMENDED COMPLAINT.

JURISDICTION.

1. The action arises under the Fifth and Fourteenth Amendments to the Constitution of the United States; under Title 28 U.S.C. §§ 1331(a), 1361, 1651, 2201, 2202; The Administrative Procedure Act, Title 5 U.S.C. §§ 701, 702, 703, 704, 705; Title I of the Housing Act of 1949, as amended, Title 42 U.S.C. §§ 1441 et seq., more particularly, 42 U.S.C. §§ 1451, 1456(h), 1457, 1460(c), 1460(c)(4), (6), (9), and (10), 1460(d)(2), 3535(d), and regulations adopted pursuant thereto; and under the National Historic Preservation Act of 1966, Public Law 89-665, 80 Stat. 915 (1966), 16 U.S.C. §§ 470-470m, more particularly, Section 106 of the Act, 16 U.S.C. § 470f, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interests and costs, the sum of ten thousand dollars.

PLAINTIFFS.

2. South Hill Neighborhood Association, Inc., is a nonprofit membership association incorporated under Kentucky Revised Statutes Ch. 273, with offices in Lexington, Kentucky. The Plaintiff association has several hundred members, over fifty percent (50%) of whom live and own

property in the neighborhood bounded by High Street and Maxwell Streets in the City of Lexington.

3. The Blue Grass Trust For Historic Preservation, Inc., is a non-profit association incorporated under Kentucky law, with its principal office in Lexington, Kentucky, which has as its central purpose historic preservation.

4. Curtis Harris resides at and owns the property located at 341 Madison Place, Lexington, Kentucky, which property is located within a few blocks of the National Historic District designated on West High Street. Curtis Harrison is the President of the South Hill Neighborhood Association, Inc., is a United States and Kentucky citizen, is a federal, state and local taxpayer, and is a member of several Kentucky historic preservation groups, among which are Citizens for Historic Lexington, The Bluegrass Trust for Historic Preservation, and Historic Lexington, Inc.

5. Plaintiff Mrs. Stathis Kofoglis, is a widow and is the owner of the property designated as 317 West High Street, which property is located within the area designated as a National Historic District on the National Register of Historic Places, and which property is also located within the boundaries of the tract of land described and set forth in the plans for the City of Lexington Urban Renewal Project. Mrs. Kafoglis is a United States and Kentucky citizen, and a federal, state and local taxpayer.

6. Mr. and Mrs. W. T. Dennis are the owners in fee simple absolute of the property designated as 315 West High Street, which property is located within the area designated as a National Historic District on the National Register of Historic Places, and which property is also located within the boundaries of the Lexington Urban Renewal Project.

7. The named Plaintiffs are representative parties and bring this action under FRCP 23 on behalf of themselves,

and on behalf of all other citizens of the United States, all other citizens of the Commonwealth of Kentucky, all other federal, state and local taxpayers, all other property owners in the City of Lexington, and all other public or private groups and individuals interested in historic preservation, similarly situated. The class as so described is so numerous that joinder of all members is impracticable; there are questions of fact or law common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; the parties defendant opposing the class have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

DEFENDANTS.

8. The federal defendant George Romney is the Secretary of the Department of Housing and Urban Development of the United States who administers the Housing Act of 1949 as amended, including the federal urban renewal program.

9. The local defendants are the Mayor and the Board of City Commissioners of the City of Lexington, and the Urban Renewal and Community Development Agency of the City of Lexington (hereinafter referred to as the Agency) a municipal corporation, existing under and pursuant to KRS Chapter 100, and acting under KRS 99.330, et seq., and City of Lexington Ordinances adopted thereunder, which agency functions as a local development agency under the Housing Act of 1949, as amended, and which has promulgated and administers the Lexington Urban Renewal Plan pursuant to which the buildings located on the 200 block of West High Street in Lexington, Kentucky, are to be demolished. Individual local defendants Robert E. Featherston is Chairman of the Agency;

William R. Embry is Vice-Chairman; Byron Romanowitz, D. C. Noble and H. J. Hagler are the members of the Agency and individual defendant Jennie Bryant is the Director of the Agency.

10. Private defendant Citizens Union National Bank and Trust Company of Lexington, Kentucky (hereinafter referred to as the Bank) is acting under a land disposal agreement and deed as a redeveloper of the land located in the 200 block of West High Street in Lexington, Kentucky, under and pursuant to the Housing Act of 1949, as amended, and the Lexington Urban Renewal Plan. Private defendant Norwood Construction Company, Lexington, Kentucky, a Kentucky corporation is the successful bidder who has been awarded a contract by the Agency immediately to demolish and raze the buildings located on the 200 block of West High Street. Individual defendant J. Norwood Hodge is president of Norwood Construction Company and directly supervises and directs its bulldozer operations.

FACTS.

11. Located on the south one-half of the 100, 200 and 300 blocks of the North Side of West High Street in Lexington, Kentucky, are fourteen buildings which because of their age, uniqueness, and history are and for many years have been of outstanding historic, architectural, and cultural significance to the city, state and region. The buildings were accepted by the Keeper of the National Registry for Historic Places and listed as the West High Street Historic District on the National Register on July 10, 1969. Official notice thereof was published in the Federal Register on August 5, 1969. The particular West High Street buildings which are located in and integral parts of the Historic District are: 125, 129, 133, 201, 211, 215, 221, 225, 229, 233, the Asbury Methodist Episcopal Church at the corner of West High Street and Mill Street, 303-305, 315, 317 and 319. Seven of the fourteen buildings are located on the South

one-half of the North Side of West High Street in the 200 block and are the specific buildings in controversy here.

12. The Urban Renewal and Community Development Agency of the City of Lexington, Kentucky, (Agency) promulgated its Urban Renewal Area Project Ky. R-63 in December 1965 providing for redevelopment of a twenty acre section of the downtown portion of the city including the 100, 200 and 300 blocks on the North side of West High Street. The Secretary of Housing and Urban Development (HUD) approved the plan and authorized federal funding of the Project under a Loan and Capital Grant Contract dated June 7, 1966, under which the Agency has received and expended, currently holds and will be entitled to receive and expend federal funds in the future in the implementation of the Project. The original Project failed to note the presence and significance of certain known historical buildings located on the above-cited blocks. The Project was amended by the Agency in July 1968 so as to provide for location on the 200 block of West High Street a proposed Civic Center but again the Project plan failed to note the existence or significance of the historical buildings on that site although such information was called to its attention in formal meetings and otherwise. The Agency again amended its Project plan in January 1969 and provided for relocation of the Civic Center to another site and redesignation of the redevelopment use of the South one-half of the 200 block on West High Street for commercial development or in the alternative for historic preservation.

13. The Agency acquired seven of the historic buildings all located on the South one-half of the 200 block of West High Street by February 1969 for approximately $131,000 and in May 1969 promulgated its Land Disposal Plan under which the parcels were to be advertised and sold as consolidated to redevelopers which plan HUD approved. The historic sites and other parcels on the 200 block of West High Street were publicly advertised for sale by Invitation

for Proposals on Block 5 Parcel 3 published on May 9, 1969, and the competitive proposals were to be opened before the Agency on June 10, 1969. The Bank submitted a proposal whereby it would acquire the land and, utilizing substantially the entire block, construct thereon a multi-story commercial building. A Proposal that the Agency and City restore the buildings was submitted by a historic preservation group. The Agency and the Bank executed a Contract for Sale of Land for Private Redevelopment on July 9, 1969, selling Block 5 Parcel 3 to the Bank but requiring the Agency to clear the land. Thereafter, on July 10, 1969, the two proposals were formally opened before the Agency. By a formal vote taken on July 18, the Agency accepted the proposal submitted by the Bank. This action HUD approved on July 29, 1969. The Agency delivered its deed conveying the land to the Bank on October 1, 1969. The Agency advertised for demolition bids on the land and accepted the bid of Norwood Construction Company on October 14, 1969, and on October 15, 1969, the parties executed a demolition contract which HUD approved on October 20, 1969. The Agency on October 15, 1969, instructed the Contractor to destroy the buildings immediately. Upon completion of demolition the Contractor will be entitled to be paid $6,428.00 from Agency funds. All these proceedings and actions described in Paragraph 4(b) were undertaken by the Defendants without complying with the provisions of Section 106 of the National Historic Preservation Act of 1966, P.L. 89-665 or with the 1966 Amendments to the Housing Act of 1949.

14. Plaintiff is informed and believes and therefore alleges that the Defendants well knew of the existence and significance of the historic buildings when the Project plan was first submitted and approved in 1966 amended in 1968 and in 1969, and at the time the proposal by the Bank was accepted, and was on actual and official notice of the existence of the registered Historic District before the demoli-

tion bid was accepted and approved, yet throughout they failed and refused sufficiently to describe or note the significance of the historic buildings and Historic District on the appropriate Project documents and maps or to file accurate and complete updated documents and maps noting the existence of the Historic District, and in divers ways affirmatively concealed from the public the fact that a Historic District containing registered buildings would be destroyed by the proposed redevelopment of the 200 block of West High Street by a private redeveloper. Specifically, during the period from December 1965 through October 14, 1969, these Plaintiffs and the public were led to believe by the Agency, its members and Director, that the historic buildings would not be demolished but instead would be restored on their sites or moved to another location and restored and this impression was effectuated by means of Agency meetings held without public notice and informal, special and call meetings at which actions relating to the destruction of the historic buildings were taken without public participation. The second amendment to the Project plan stated the buildings would be preserved on their sites and the Agency resolution accepting the Bank's proposal expressly provided for moving the buildings to another location for restoration. Further, Plaintiff is informed and believes and therefore alleges that selection of the redevelopment proposal of the Bank was accomplished by the Agency in an arbitrary, capricious and biased proceeding.

15. Plaintiff made oral complaint of the proposed destruction of the Historic District to the Atlanta Regional Director of HUD on October 8, 1969, who failed and refused to act. By formal written complaint letter on October 9, 1969, Plaintiff informed the Secretary of the facts and called upon him to act to forestall acceptance of the demolition bids, withdraw his approval of the Project plan regarding the lands herein and to refer the matter to the Advisory Council on Historic Preservation under the National His-

toric Preservation Act of 1966. The Secretary failed and refused to act. Plaintiffs and other members of the class appeared before the Agency at its meeting on October 14, 1969, where they stated the facts concerning the Historic District and remonstrated and called upon the Agency to delay taking action on the demolition bids, correct their Project plan and refer the matter to HUD for comment by the Advisory Council under the National Historic Preservation Act of 1966. The Agency declined so to act and accepted the bid of the Contractor, ordering immediate demolition of the buildings.

16. At its meeting on October 14, 1969, upon the request of Plaintiff—the Agency agreed and directed its Director, Jennie Bryant, to notify these Plaintiffs prior to commencement of demolition and on October 15, 1969, the attorney for the Agency was informed of Plaintiffs preparation of this action and intent to file it promptly and in response to query informed these Plaintiffs that the demolition contract had not been formally executed at that time and demolition would likely not commence prior to October 17, 1969. Plaintiff is informed and believes and therefore alleges that at approximately 6:00 p.m. on October 15, 1969, defendant Jennie Bryant hand carried the demolition contract to the residence of defendant J. Norwood Hodge where he executed it and gave orders to his corporate agents to proceed with demolition that night despite the fact no demolition permit for destruction of the buildings had been obtained from the City of Lexington. At approximately 9:00 p.m., October 15, 1969, the bulldozers of defendant Norwood Construction Company began demolition of the building located at 215 West High Street, which is listed on the National Register. Demolition was halted at approximately 9:45 p.m. that night upon the request of the Lexington City Manager. The next morning on October 16, 1969, at 8:30 a.m. demolition was resumed and at the same time Plaintiff filed an action against the local and

private Defendants in the Circuit Court of Fayette County and obtained a temporary restraining order against them which was served on Defendant J. Norwood Hodge at the demolition site at approximately 10:45 a.m., October 16, 1969, but not before one Registered building was substantially destroyed and two other buildings in the Historic District damaged, one irreparably. The Fayette Circuit Court restraining order was dissolved upon the institution of this action.

17. The State Liaison Officer for Historic Preservation on October 20, 1969, requested the Advisory Council for Historic Preservation to investigate, consider and comment to HUD and the Agency concerning the matter herein, and to make recommendations for preserving the historical significance of the West High Street area. The Advisory Council has not yet acted.

18. Unless the private and local Defendants are temporarily enjoined and restrained from the commission of the acts threatened by them as above set forth and the federal and local Defendants be ordered to perform their duties under federal law the Plaintiffs will suffer great and irreparable damage, in that unique buildings registered on the National Register of Historic Buildings will be destroyed by the illegal acts of the Defendants and their federal claim rendered moot.

19. The Defendants and the public will not suffer loss caused by delay in demolition of the buildings above described.

FIRST CLAIM FOR RELIEF.

Plaintiff joins as parties defendant for purposes of obtaining specific relief under its First Claim for Relief the Secretary of Housing and Urban Development and joins the remaining named defendants in aid of the jurisdiction of the Court under 28 U.S.C. 1651, and in order that they may be heard on these issues. Paragraphs 1-19 of this com-

plaint are incorporated by reference into this First Claim for Relief.

FIRST COUNT.

The Secretary of HUD violated the provisions of Section 106 of the National Historic Preservation Act of 1966 in that he approved the contract for Disposition of Land to Private Redeveloper and the Demolition Contract entailing destruction of the Historic District after being put on notice by the Agency's Second Amendatory Project Report, the Federal Register and Plaintiff's complaint letter that the buildings were listed as a Historic District on the National Register of Historic Places and thereby approved expenditure of federal funds without taking into account the effect of Project Ky. R-63 on said Historic District.

SECOND COUNT.

The Secretary of Housing and Urban Development has violated the provisions of the National Historic Preservation Act of 1966 by his approval of the Urban Renewal Project and amendments thereto and Land Disposal Agreement executed by and between the Agency and the Bank without complying with the provisions of Section 106 of the National Historic Preservation Act of 1966 in that he failed to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the impending effect of a federally-assisted urban renewal undertaking upon historic buildings listed on the National Register; and he will continue and compound said violation by failing and refusing to withdraw his approval and to withhold, recover or restrict federal funds previously authorized or disbursed by him to the Agency which will be used to demolish and raze the buildings in controversy.

THIRD COUNT.

The Secretary of Housing and Urban Development has violated the Housing Act of 1949, and the regulations

promulgated thereunder, and, specifically, 42 U.S.C. 1460 (c)(4) by approving the Project Ky. R-63 and amendments thereof and the land disposal agreement by and between the Agency and the Bank wherein the lands in controversy will be acquired by a private redeveloper for a sale price equal to approximately fifty percent (50%) of the fair market value of the land in violation of 42 U.S.C. §1460 (c)(4) and Part 14, ch 1, § 1, p. 1 (7-12-62), Urban Renewal Manual, Policies and Requirements for Local Public Agencies, U.S. Housing and Home Finance Agency, Urban Renewal Administration.

FOURTH COUNT.

The Secretary of HUD has violated the Housing Act of 1949, as amended, by approving the land disposal plan of the Agency which plan adopted an unauthorized method of disposal of property acquired by the Agency, to wit: the setting of a pre-determined fixed price for property below fair market value against which both private commercial developers and public and quasi-public developers were to submit competitive land-use plans and bids. The said method of property disposal is not authorized by the Housing Act of 1949, as amended, and is in direct contravention of the express policy of the Act, as expressed in 42 U.S.C. §1457 and numerous other sections of the Act and regulations to allow disposition of property below fair market value only in the case of developments for public housing or low income housing.

FIFTH COUNT.

The Secretary of HUD violated 42 U.S.C. §1460(b) (c) and 42 U.S.C. §1451(c) and 42 U.S.C. §1460(c)(10) by failing to require the Agency to submit and to update an urban renewal plan embodying a workable program for community improvement which is of sufficient scope and content to furinsh a basis for evaluation of need for the destruction

of the Historic District and which is and remains sufficiently complete to indicate, historic and architectural preservation within the urban renewal area encompassing West High Street and by failing to determine prior to giving his approval that the objectives of the urban renewal plan could not be achieved through rehabilitation of the south one-half of the 200 block on West High Street under the second Amendatory Project Report. Specifically, the Secretary failed to require the Agency to complete its plan at the time of its last amendment in February 1969 regarding utilization of the south one-half of the north side of West High Street and at the time HUD was asked to approve the acceptance by the Agency of the proposal submitted by the Bank on July 18, 1969, or at the time HUD was asked to approve acceptance of the demolition contract bid by Norwood Construction Company on October 14, 1969.

SECOND CLAIM FOR RELIEF.

For the purpose of stating the Second Claim for Relief, Plaintiff joins all the defendants to this action, i.e., federal, local, and private defendants and asserts the claim for relief against all of them as arising under the Constitution and laws of the United States and the Commonwealth of Kentucky. Paragraphs 1-19 are hereby incorporated by reference.

FIRST COUNT.

The federal and local defendants violated their federal and state duties under the applicable statutes and the regulations adopted pursuant thereto by failing to comply with the provisions of section 106 of the National Historic Preservation Act of 1966 and the 1966 Amendments to the Housing Act of 1949; by failing to update sufficiently and to supply timely Project plan information concerning the Project to the public and to the federal defendants concerning the historic nature of the buildings in controversy as required by 42 U.S.C. §1456(h); and by failing to require and de-

velop criteria and conditions which would require or encourage rehabilitation, restoration or preservation of the buildings as required by 42 U.S.C. §1460(c); and by adopting land disposal methods not authorized by law and disposing of the land in an illegal manner under Urban Renewal Manual 14-1-1 (7-12-62) and KRS 99.350(7) and 99.360; and regarding all such undertakings acted arbitrarily and capriciously in violation of plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

SECOND COUNT.

The defendants have violated Plaintiff's rights under the above-cited sections by entering into and performing contracts which require the destruction of the buildings, under circumstances in which the defendants had constructive and, in the alternative, actual knowledge that the contracts were being executed in violation of state and federal law. The private defendants have acted and propose and continue to act as agents for the local and federal defendants in completing the land disposal and demolition undertaking herein thereby destroying the jurisdiction of this Court and rendering Plaintiff's federal claims herein moot unless restrained.

THIRD COUNT.

The federal and local defendants violated Plaintiffs rights under the Fifth and Fourteenth Amendments to the United States Constitution by failing to promulgate the requisite rules, regulations, guidelines, by-laws, or contract provisions, convenants or conditions pursuant to their respective authority under the Housing Act of 1949, as amended, § 1456(7) and KRS 99.360(b), establishing procedures regarding the conduct of administrative proceedings under these statutes which will satisfy the requirements of administrative due process under the Fifth and Fourteenth Amendments to the United States Constitution;

specifically, the Agency amended its bylaws at a meeting without notice to authorize future meetings without notice to the public and thereafter conducted informal special and regular meetings without notice at which administrative decisions were made and formal action taken regarding matters bearing on destruction of the historic buildings here in controversy.

FOURTH COUNT.

The local Defendants violated Plaintiffs' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution by making administrative decisions regarding the urban renewal plan and amendments, the land disposal method and contracts and the demolition contract without sufficient evidence and as a biased panel and without giving these Plaintiffs and the public a reasonable opportunity to be heard for the reason that meetings relating to the matters in controversy were held without notice to these Plaintiffs and the public in violation of Urban Renewal Manual, Policies and Requirements for Local Public Agencies, Ch. 1, § 1, (7-12-62); and decisions were made regarding demolition without knowledge of or without considering information necessary to an objective and informed decision; and that some members of the Agency who had or anticipated having private financial interests in property located in the urban development area under KRS 99.350(7) may have acted with bias of personal interest which tended directly or indirectly to substantially affect the outcome of the administrative decision being made.

RELIEF.

Wherefore: The Plaintiffs demand:

That the Court issue a preliminary injunction and a permanent injunction without bond against the federal defendants enjoining them to take all necessary steps; including withdrawal of prior approval of the Lexington Urban

Renewal Project Ky. R-63 as amended or parts thereof and withholding of federal funds from the Project in order to prevent the demolition, removal or other destruction of the fourteen historic buildings located in 100, 200, 300 blocks on West High Street, Lexington, Kentucky, until such time as the Court shall later determine that they have complied with federal law.

That the Court issue a preliminary injunction and permanent injunction, without bond restraining the federal and local defendants from taking any steps to demolish or remove the buildings in controversy, and ordering the local defendants to take whatever affirmative steps are necessary and within their power to prevent the private defendants from carrying out the same acts.

That the Court issue a preliminary injunction and permanent injunction restraining the private defendants from demolishing, destroying or removing the buildings in controversy.

That the Court declare the rights of the parties and reform or set aside the contracts, deeds and agreements between the federal and local defendants and the private defendants relating to the destruction of the Historic District on West High Street; that the Court order the defendants to reconstruct and repair the registered buildings previously demolished or damaged; that the Court order the federal defendant to refer the matter to the Advisory Council on Historic Preservation for comment and for recommendations regarding continuing protection and preservation of the Historic District; and

That the Court declare that the Plaintiffs have rights arising under the National Historic Preservation Act and the National Housing Act as amended in 1966, and that the Court issue a mandamus against the Secretary of Housing and Urban Development ordering him to do his duties under those Acts,

That the Court grant judicial review of the Agency action taken by the United States Department of Housing and Urban Development and the Urban Renewal and Community Development Agency of Lexington, undertaking to demolish buildings registered on the National Register of Historic Places,

That the Court grant all other appropriate relief to which the Plaintiffs may be entitled.

(s) Roger B. Sledd,
Attorney for the Plaintiffs,
1404 First Security National
Bank Building,
Lexington, Kentucky.

CERTIFICATE OF SERVICE.

I, Roger B. Sledd, attorney for the plaintiffs in the above entitled action, hereby certify that on the 28th day of October, 1969, I served the attached Amended Complaint And Motion For Preliminary Injunction upon: the attorneys for the defendants:

Mr. Montjoy Trimble,
Kincaid, Wilson, Schaeffer, Trimble,
& Hembree,
500 Central Bank Building,
Lexington, Kentucky,

Mr. A. Gene Oliver,
Strother, Oliver & Strother,
Citizens Union Bank Building,
Lexington, Kentucky,

Mr. Richard Smith,
Acting City Manager and Corporation Counsel,
City Manager's Office,
Municipal Building,
Lexington, Kentucky,

Mr. George Cline,
United States District Attorney for
the Eastern District of Kentucky,
Federal Post Office Building,
Lexington, Kentucky,

by leaving copies at their offices above designed with their clerks or other person in charge thereof; and on October 28, 1969 by depositing a copy in the United States mails, air mail postpaid addressed to George Romney, Secretary, United States Department of Housing and Urban Development, 451 Seventh Street, S. W., Washington, D. C. 20410.

(s) Roger B. Sledd,
Attorney for the Plaintiffs,
1404 First Security National
Bank Building,
Lexington, Kentucky.

APPENDIX "G"

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Civil Action No. 2080

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., ET AL., - - - - - - - - - *Plaintiffs,*

v.

GEORGE ROMNEY, Secretary of the United States Department of Housing and Urban Development, et al., - - - - - - - - *Defendants.*

ANSWER OF CERTAIN DEFENDANTS.

Come the Defendants, City of Lexington, Kentucky, a municipal corporation, Charles Wylie, Joseph Graves, Harry Sykes, Thomas Underwood, Fred Fugazzi, Urban Renewal and Community Development Agency of the City of Lexington, a municipal corporation, Robert E. Featherston, William R. Embry, Bryon Romanowitz, D. C. Noble, H. J. Hagler, Jennie Bryant, Citizens Union National Bank and Trust Company, Inc., a national banking corporation, Norwood Construction Company, Inc., a Kentucky corporation, and J. Norwood Hodge (hereinafter sometimes referred to as "these Defendants"), and for their answer to the Complaint as amended of the Plaintiffs, state as follows:

FIRST DEFENSE.

The Complaint as amended fails to state a claim upon which relief can be granted against these Defendants.

SECOND DEFENSE.

The Plaintiffs are not real parties in interest and have no standing or capacity to bring this action.

THIRD DEFENSE.

This Court lacks jurisdiction because it appears on the face of the Complaint as amended that the Plaintiffs state no claim against these Defendants under the Constitution, laws or treaties of the United States of America.

FOURTH DEFENSE.

The matter in controversy does not exceed the sum or value of $10,000.00, exclusive of interest and costs.

FIFTH DEFENSE.

All matters and issues involved in this matter are involved in and have been determined by the proceedings in the action styled *South Hill Neighborhood Association, Inc., et al.* v. *Urban Renewal and Community Development Agency of the City of Lexington, et al.*, heretofore pending in the Fayette Circuit Court of Kentucky, First Division, as Civil Action 25992, at the time this action was commenced in this Court, and now pending in the Court of Appeals of Kentucky as *South Hill Neighborhood Association, Inc., and Curtis Harrison, Appellants* v. *Urban Renewal and Community Development Agency of the City of Lexington, et al., Appellees.*

SIXTH DEFENSE.

The Plaintiffs are guilty of laches, waiver, and are estopped from enforcing any rights or remedies that they may or might have under law.

SEVENTH DEFENSE.

1. These Defendants deny the averments contained in Paragraph 1 of the Complaint as amended.

2. The Defendants admit the averment in Paragraph 2 of the Complaint as amended that South Hill Neighborhood Association, Inc. is a nonprofit membership association incorporated under KRS Chapter 273 with offices in Lexington, Kentucky. The Plaintiffs deny each and every other averment contained in Paragraph 2 of the Complaint as amended.

3. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 3 of the Complaint as amended.

4. These Defendants admit the averment contained in Paragraph 4 of the Complaint as amended that Curtis Harrison resides at and owns property located at 341 Madison Place, Lexington, Kentucky. These Defendants deny each and every other averment contained in Paragraph 4 of the Complaint as amended.

5. These Defendants admit the averments contained in Paragraph 5 of the Complaint as amended.

6. These Defendants admit the averments contained in Paragraph 6 of the Complaint as amended.

7. These Defendants deny the averments contained in Paragraph 7 of the Complaint as amended.

8. These Defendants admit the averments contained in Paragraph 8 of the Complaint as amended.

9. These Defendants admit the averments contained in Paragraph 9 of the Complaint as amended.

10. These Defendants admit the averments contained in Paragraph 10 of the Complaint as amended.

11. These Defendants admit the averments contained in Paragraph 11 of the Complaint as amended that:

(a) The buildings were accepted by the Keeper of the National Registry for Historic Places and listed as the West High Street Historic District on the National Register on July 10, 1969, and

(b) Official notice thereof was published in the Federal Register on August 5, 1969.

These Defendants deny each and every other averment contained in Paragraph 11 of the Complaint as amended. By way of further answer to Paragraph 11 of the Complaint as amended, these Defendants believe and therefore aver and allege that the registration of the West High Street Historic District on the National Registry for Historic Places was illegal in that such registration did not comply with the laws and regulations of the United States of America applicable thereto.

12. These Defendants admit the averments contained in Paragraph 12 of the Complaint as amended that:

(a) The agency promulgated its Urban Renewal Area Project, Ky. R-63 in December, 1965, providing for redevelopment of a twenty-acre section of the downtown portion of the City of Lexington, including the 100, 200 and 300 blocks on the north side of West High Street,

(b) The Secretary of Housing and Urban Development approved the plan and authorized federal funding of the project under a Loan and Capital Grant Contract dated June 7, 1966, under which the Agency has received and expended federal funds,

(c) The Project was amended by the Agency in July of 1968, and

(d) The Agency again amended its Project Plan in January of 1969.

These Defendants deny each and every other averment contained in Paragraph 12 of the Complaint as amended. By way of further answer to Paragraph 12 of the Complaint as amended, these Defendants aver and allege that

the Secretary of Housing and Urban Development has approved the Plan dated December, 1965, the First Amended Plan dated July, 1968, and the Second Amended Plan dated January, 1969, that each and every Plan has called for the demolition and removal of the buildings located in the 100, 200 and 300 blocks on the north side of West High Street and that the Agency was under no legal or other obligation to note the existence of any so-called historical buildings on its Urban Renewal Plan.

13. These Defendants admit the averments contained in Paragraph 13 of the Complaint as amended that:

(a) The Agency acquired buildings all located on the north one-half of the 200 block of West High Street by February, 1969;

(b) Parcels on the 200 block of West High Street were publicly advertised for sale by invitation for proposals published on May 9, 1969;

(c) The bank submitted a proposal whereby it would acquire the land and construct thereon a multi-story commercial building to cost between $4,000,000.00 and $8,000,000.00;

(d) The contract for sale of land between the Agency and the bank requires the Agency to clear the land of all improvements;

(e) The Agency accepted the proposal submitted by the bank;

(f) The Agency advertised for demolition bids on the land and accepted the bid of Norwood Construction Company on or about October 14, 1969;

(g) On or about October 15, 1969, the Agency and Norwood Construction Company executed a demolition contract;

(h) On October 15, 1969, the Agency instructed Norwood Construction Company to destroy the buildings; and

(i) Upon completion of demolition of the buildings, Norwood Construction Company will be entitled to $6,428.00 from Agency funds.

These Defendants deny each and every other averment contained in Paragraph 13 of the Complaint as amended.

14. These Defendants deny each and every averment contained in Paragraph 14 of the Complaint as amended. By way of further answer to Paragraph 14 of the Complaint as amended, these Defendants deny that they were required by any law or regulation to describe or note the significance of any so-called historic buildings and historic districts or any project document or maps or to file any updated documents or maps noting the existence of any so-called historic district.

15. These Defendants admit the averment contained in Paragraph 15 of the Complaint as amended that by letter dated October 9, 1969, the Plaintiff, Curtis Harrison, complained to the Defendant, George Romney. A copy of the letter of Curtis Harrison dated October 9, 1969, is attached hereto and made a part hereof as Exhibit "A". These Defendants admit the averment contained in Paragraph 15 of the Complaint as amended that certain persons appeared before the Agency at its meeting on October 14, 1969, and that the Agency accepted the bid of the contractor for demolition of the buildings. These Defendants deny each and every other averment contained in Paragraph 15 of the Complaint as amended. By way of further defense to the averments contained in Paragraph 15 of the Complaint as amended, these Defendants allege that on or about October 14, 1969, Lawrence M. Cox, Assistant Secretary, Renewal and Housing Assistance, Housing and Urban Development, notified Curtis Harrison, President of South Hill Neighborhood Association, that:

"HUD has no authority to intercede in the execution of the downtown Urban Renewal Project. HUD

is *obligated* under a *Loan and Grant Contract* to finance the carrying out of the Urban Renewal Plan as amended. Once we are so obligated, we are no longer free to require changes in a project due to *subsequent* listings of historic properties on National Registry." (Emphasis added.)

A copy of the telegram of October 14, 1969, is attached hereto and made a part hereof as Exhibit "B".

16. These Defendants admit the averments contained in Paragraph 16 of the Complaint as amended that:

(a) At its meeting on October 14, 1969, the Defendant, Jennie Bryant, agreed to notify certain of the Plaintiffs prior to the commencement of demolition of the buildings;

(b) The Defendant, Jennie Bryant, carried the demolition contract to the residence of the Defendant, J. Norwood Hodge, where he executed the contract;

(c) At approximately 9:00 P.M., October 15, 1969, the Defendant, Norwood Construction Company, began demolition of certain of the buildings;

(d) Demolition was halted by the City Manager of the City of Lexington, Kentucky;

(e) On October 16, 1969, demolition was resumed; and

(f) Certain of the Plaintiffs filed an action against the local and private Defendants in the Fayette Circuit Court and obtained a temporary restraining order which was served on the Defendant, J. Norwood Hodge, on October 16, 1969.

These Defendants deny each and every other averment contained in Paragraph 16 of the Complaint as amended.

17. These Defendants deny the averments contained in Paragraph 17 of the Complaint as amended. By way of further defense to Paragraph 17 of the Complaint as

amended, these Defendants allege that on October 20, 1969, the State Liasion Officer of the Commonwealth of Kentucky for Historic Preservation sent a telegram to the National Advisory Council for Historic Preservation and that the State Liasion Officer sent copies of such telegram to Judge James Park, Jr., Judge, Fayette Circuit Court, Judge Mac Swinford, Judge, United States District Court, and to Eugene Mooney, Attorney for the Plaintiffs. On Sunday evening, October 19, 1969, Eugene Mooney, Attorney for the Plaintiffs, called the State Liasion Officer for Historic Preservation and *requested* the State Liasion Officer for Historic Preservation to send a telegram to Judge James Park, Jr., and Judge Mac Swinford. Eugene Mooney did not request the State Liasion Officer to mail a copy of that telegram to any of the counsel for these Defendants. The wording of the telegram from the State Liasion Officer to the National Advisory Council was suggested by counsel for the Plaintiffs, Eugene Mooney. These acts of counsel for the Plaintiffs were taken to improperly influence this Court and the Fayette Circuit Court which had coming before it, on the afternoon of October 20, 1969, Defendants' motions to dismiss the state court action then pending. At the hearing before the Fayette Circuit Court in the afternoon of October 20, 1969, counsel for the Plaintiffs did not disclose to the Fayette Circuit Court that the telegram of the State Liasion Officer to the Advisory Council had been sent at the request of and had been instigated by counsel for the Plaintiffs. Counsel for the Plaintiffs did not disclose to counsel for Defendants that such a telegram had been sent by the State Liasion Officer. The truth of the allegations of the Defendants herein is shown in the deposition of Frank J. Groschelle which has been filed in and has been made a part of these proceedings.

18. These Defendants deny the averments contained in Paragraph 18 of the Complaint as amended.

19. These Defendants deny the averments contained in Paragraph 19 of the Complaint as amended.

20. These Defendants deny the averments contained in the paragraph of the Complaint as amended styled "First Claim for Relief".

21. These Defendants deny the averments contained in the "First Count" of the Complaint as amended.

22. These Defendants deny the averments contained in the "Second Count" of the Complaint as amended.

23. These Defendants deny the averments contained in the "Third Count" of the Complaint as amended.

24. These Defendants deny the averments contained in the "Fourth Count" of the Complaint as amended. By way of further answer to the "Fourth Count" of the Complaint as amended, these Defendants allege that the Secretary of HUD approved the expenditure of federal funds for the demolition of the so-called historic buildings prior to their listing on the National Registry on July 10, 1969.

25. These Defendants deny the averments contained in the "Fifth Count" of the Complaint as amended.

26. These Defendants deny the averments contained in the paragraph of the Complaint as amended styled "Second Claim for Relief".

27. These Defendants deny the averments contained in the "First Count" of the "Second Claim for Relief" of the Complaint as amended.

28. These Defendants deny the averments contained in the "Second Count" of the "Second Claim for Relief" of the Complaint as amended.

29. These Defendants deny the averments of the "Third Count" of the "Second Claim for Relief" of the Complaint as amended.

30. These Defendants deny the averments of the "Fourth Count" of the "Second Claim for Relief" of the Complaint as amended.

WHEREFORE, these Defendants demand that:

1. The Complaint as amended be dismissed and held for naught with prejudice to the Plaintiffs,

2. For their costs herein expended.

3. For such other and further relief as may appear equitable and just.

Kincaid, Wilson, Schaeffer, Trimble & Hembree

By (s) J. Montjoy Trimble
Attorneys for the Defendants, City of Lexington, Kentucky, Charles Wylie, Joseph Graves, Harry Sykes, Thomas Underwood, Fred Fugazzzi, Urban Renewal and Community Development Agency of the City of Lexington, Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble, H. J. Hagler, and Jennie Bryant.

Strother, Oliver & Strother
By (s) A. Gene Oliver
Attorneys for Defendant, Citizens Union National Bank and Trust Company, Inc.

Fowler, Rouse, Measle & Bell
By (s) Arthur B. Rouse, Jr.
Attorneys for Norwood Construction Company, Inc., and J. Norwood Hodge.

CERTIFICATE.

I certify that the foregoing Answer was served by mailing a true copy thereof to:

Mr. Eugene F. Mooney,
University of Kentucky,
College of Law,
Lexington, Kentucky 40506,

Mr. John E. Kennedy,
University of Kentucky,
College of Law,
Lexington, Kentucky 40506,

Mr. Robert G. Lawson,
University of Kentucky,
College of Law,
Lexington, Kentucky 40506,

Mr. Roger Sledd,
First National Bank Building,
Lexington, Kentucky 40507,
Attorneys for Plaintiffs.

and to:

Mr. George Cline,
United States District Attorney,
Federal Office Building,
Lexington, Kentucky 40507,
Attorney for the Defendant,
George Romney.

this the 6th day of November, 1969.

(s) J. Montjoy Trimble

APPENDIX "H"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2080

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., ET AL., - - - - - - - - *Plaintiffs,*

v.

GEORGE ROMNEY, ET AL., - - - - - *Defendants.*

MEMORANDUM—Filed November 14, 1969.

Plaintiffs in this action allege that George Romney, Secretary of United States Department of Housing and Urban Development, failed to notify the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. 16 U.S.C. 470.

This case is before the court on plaintiffs' motion for a temporary injunction and defendants' motions to dismiss the complaint. A full disclosure and discussion of the parties and facts which led to this controversy are imperative to a ruling on these motions.

The parties to this action include: Plaintiffs (1) South Hill Neighborhood Association, Inc. (South Hill), a non-profit Kentucky corporation having as one of its purposes the preservation of historical buildings; (2) The Bluegrass Trust for Historic Preservation, Inc. (Bluegrass Trust) a non-profit Kentucky corporation having as one of its pur-

poses the preservation of historical buildings; (3) Curtis Harrison, a citizen, taxpayer and President of South Hill; (4) Mrs. Stathis Kafoglis, a citizen, taxpayer and owner of property within the area in controversy; (5) Mr. and Mrs. W. T. Dennis, citizens, taxpayers and owners of property within the area in controversy; and Defendants (1) George Romney, Secretary of the United States Department of Housing and Urban Development (HUD); (2) The City of Lexington, Kentucky, a municipal corporation, duly organized and existing under the laws of the Commonwealth of Kentucky; (3) Honorable Charles Wylie, Mayor of Lexington, Kentucky; (4) The Board of City Commissioners of the City of Lexington, authorized city board for the City of Lexington; (5) Joseph Graves, Harry Sykes, Thomas Fugazzi, duly elected and qualified members of the Lexington Board of City Commissioners; (6) Urban Renewal and Community Development Agency of the City of Lexington (Lexington Urban Renewal Agency), a municipal corporation organized under and existing by virtue of the laws of the Commonwealth of Kentucky; (7) Robert E. Featherston, William R. Embry, Bryon Romanowitz, D. C. Noble and H. J. Hagler, duly appointed, qualified and acting members of the Lexington Urban Renewal Agency; (8) Jennie Bryant, Director of the Lexington Urban Renewal Agency; (9) Citizens Union National Bank and Trust Company, Inc. (Citizens Union Bank), a national banking corporation organized under and existing by virtue of the laws of the United States of America; (10) Norwood Construction Company, Inc. (Norwood Construction Co.), a Kentucky corporation; and (11) J. Norwood Hodge, President of Norwood Construction Co.

The facts out of which this controversy arises are as follows. The Lexington Urban Renewal Agency was formed in 1959 and has continued in existence to date. On April 1, 1965, the Board of City Commissioners of the City of Lex-

ington adopted an ordinance describing area in downtown Lexington to be appropriate for an urban renewal project. An urban renewal plan was promulgated for this area and said plan was approved by the Planning and Zoning Commission of Lexington-Fayette County at a public hearing on July 22, 1965. Notice of this plan was given to each property owner in the area bounded on the north by Main Street, on the west by Patterson Street, on the south by High Street, and on the east by Shreve Avenue. This includes the area in controversy. The method of financing costs for this project was authorized by the Kentucky Court of Appeals on October 1, 1965. See Watkins v. Fugazzi, 394 S. W. 2d 594 (Ky. 1965).

The Lexington Urban Renewal Agency's plan, Ky. R-63, was submitted to the federal authorities on December 30, 1965. On June 7, 1966, HUD approved the December, 1965, plan and authorized federal funding under a Loan and Capital Grant Contract. This plan provided that all land in the project area would be used for commercial purposes and that all land acquired would be cleared of all improvements. On October 19, 1967, the City of Lexington sold $3,500,000.00 of revenue bonds to finance its portion of the cost of the urban renewal project.

On July 22, 1968, the plan for the Lexington urban renewal project, R-63, was amended. This amendment to the 1965 plan provided for a Civic Center in an area bounded by Main, Patterson, High and Broadway Streets, and provided for an alternative use of historic preservation in the north half of the 200 block of West High Street. Seven of the buildings involved in this action are in the area with historic preservation designated as an alternate use. Any plan submitted for historic preservation was to meet standards which were explained at public meetings. If the buildings were not restored, they were to be demolished. HUD approved this first amendment on October 18, 1968.

In January, 1969, the urban renewal plan, Ky. R-63, was again amended by Lexington Urban Renewal Agency. This amendment provided for an increased expenditure of federal funds, a change in alignment of streets in the area. This amendment retained, however, the alternative use for historic preservation as contained in the July, 1968, plan and amendment. HUD approved this second amendment on May 8, 1969.

On May 9, 1969, and June 29, 1969, public advertisements appeared in newspapers inviting competitive proposals to be submitted for part of the land contained in the urban renewal plan, R-63. These proposals were formally opened before the Lexington Urban Renewal Agency on July 10, 1969. Two proposals were submitted at this time. One was from Citizens Union Bank and proposed construction of a $4,000,000.00 to $8,000,000.00 multi-story bank and office building which would ultimately employ one thousand persons. This proposal was determined by the Lexington Urban Renewal Agency to comply with their requirements. The other proposal came from Historic Lexington, Inc. (not a party to this action but of a class which plaintiffs purport to represent). Historic Lexington, Inc.'s proposal was for restoration of the buildings in this area. This proposal was determined by the Lexington Urban Renewal Agency to not be in compliance with their requirements. Historic Lexington, Inc. was notified of the plan's deficiencies and was given an opportunity to correct. Such corrections were not made.

Fourteen buildings in the Lexington urban renewal area were denominated "West High Street Historic District" and on July 10, 1969, were placed on the National Register of historical places. 16 U.S.C. 470. Official notice of this listing appeared on August 5, 1969 in 34 Federal Register.

On July 18, 1969, the Lexington Urban Renewal Agency voted to accept the proposal submitted on July 10, 1969, by the Citizens Union Bank. On July 29, 1969, the regional

HUD director notified the Lexington Urban Renewal Agency that he had "no objection to a disposal to the proposed redeveloper." Exhibit 11 of October 28, 1969, deposition of Jennie F. Bryant. The proposal of the Citizens Union Bank was accepted by the Lexington Urban Renewal Agency on September 3, 1969, and on that date a contract was entered into between the parties. The contract required the land to be cleared of all improvements. The deed to the property was tendered on October 1, 1969.

In September, 1969, the Lexington Urban Renewal Agency had advertised for demolition bids for buildings on the property sold to Citizens Union Bank. On October 14, 1969, Jennie Bryant, director of Lexington Urban Renewal Agency, received verbal approval from HUD for demolition of the seven buildings on the 200 block of High Street by Norwood Construction Co. That same day the demolition bid of Norwood Construction Co. was accepted. The demolition contract was entered into between the parties on October 15, 1969. During the evening of October 15, 1969, and the morning of October 16, 1969, demolition was begun on the buildings. This demolition completely destroyed one building and damaged two others.

Court action on this controversy has been in the Fayette County Circuit Court and this court. On October 16, 1969, substantially the same plaintiffs commenced action against substantially the same defendants, with the exception of George Romney. A temporary restraining order was issued to prohibit further demolition of the buildings by Norwood Construction Co. Judge Park of the Fayette Circuit Court on October 21, 1969, entered findings of fact and conclusions of law which dismissed the plaintiffs' complaint for failure to state a claim upon which relief could be granted. In dismissing the complaint and dissolving the restraining order, Judge Park said "this is a final judgment insofar as the plaintiffs' cause of action is concerned." South Hill Association, Inc. et al. v. Urban Renewal and Community

Development Agency of the City of Lexington, et al., Fayette Circuit Court First Division No. 25992, Judgment of October 21, 1969. On October 22, 1969, the Kentucky Court of Appeals, sitting en banc, overruled plaintiffs' motion for interlocutory injunctive relief pending appeal.

Action was commenced in this court on October 17, 1969. A temporary restraining order was issued by this court on October 23, 1969, and a hearing was held October 31, 1969. At this hearing it was ordered that the parties enter findings of fact and conclusions of law from which this court could enter a judgment. Federal Rules of Civil Procedure 52. This has been done.

Relief requested in plaintiffs' amended complaint seeks: (1) a preliminary injunction and a permanent injunction without bond—a) against federal defendants enjoining them, including withdrawal of prior approval of funds, to remove or destroy the fourteen buildings in question until the court shall determine they have complied with federal law; b) to restrain federal and local defendants from taking steps to demolish or remove buildings in controversy, including affirmative orders to prevent private defendants from carrying out acts; c) to restrain private defendants from demolishing, destroying, or removing said building; (2) a declaration of rights among parties and reformation of contracts, deeds and agreements relating to destruction of buildings; (3) an order for defendants to reconstruct and repair damaged buildings; (4) an order for federal defendant to refer the matter to Advisory Council on Historic Preservation for comment and for recommendations; (5) court declaration that plaintiffs have rights arising under National Historic Preservation Act and National Housing Act and for court to issue mandamus against federal defendant ordering him to do his duties under the Act; (6) a grant of judicial review of action taken by HUD and Lexington Urban Renewal Agency in undertaking to demolish

said buildings; and, (7) all other appropriate relief to which the plaintiffs may be entitled.

The defendant, George Romney (HUD), has moved to dismiss the complaint on the grounds that: (1) plaintiffs lack standing to sue; (2) defendant has no authority over demolition; and, (3) plaintiffs have no right to a hearing.

The remaining defendants move to dismiss plaintiffs' complaint on the grounds: (1) that the complaint fails to state a claim upon which relief can be granted; (2) that plaintiffs are not real parties in interest and have no standing or capacity to bring this action; (3) that this court lacks jurisdiction because it appears on the face of the complaint that plaintiffs state no claim under the Constitution, Laws or Treaties of the United States; (4) that all matters and issues herein involved have been fully determined by the proceedings in state court; and, (5) that the plaintiffs are guilty of laches, waiver and are estopped from enforcing any right or remedies they may have under law.

Plaintiffs attempt to invoke the jurisdiction of this court under 28 U.S.C. 1331(a) by alleging that the amount in controversy exclusive of interest and costs exceeds $10,000 and that the claim arises under the Constitution, law or treaties of the United States. More specifically plaintiffs allege their claims arise under the National Historic Preservation Act of 1966, 16 U.S.C. 470f; the Housing Act of 1949 as amended, 42 U.S.C. 1451(c), (e), 1455(e), 1456(c)(6), (7), 1460(c); the Administrative Procedures Act, 5 U.S.C. 702, 703; 28 U.S.C. 1361; and 28 U.S.C. 1651.

In 1966, Congress enacted the National Historic Preservation Act. 16 U.S.C. 470 *et seq.* Congress found "that the spirit and direction of the Nation are founded upon and reflected in its historic past;" and "that the historical and cultural foundations of the Nation should be preserved.

. . ." 16 U.S.C. 470(a), (b). To implement this policy, Congress provided in 16 U.S.C. 470f that:

> "The head of any Federal Agency having direct or indirect jurisdiction over a proposed . . . federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any . . . building, structure, or object that is included in the National Register. The head of any such Federal Agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."

Congress amended the National Housing Act of 1949 so that it would be compatible with the National Historic Preservation Act. See 42 U.S.C. 1460(b)(2), 1460(c)(6), 1460(c)(9), 1460(c)(10).

In maintaining this action plaintiffs seek to couple the before described policy of historic preservation with 5 U.S.C. 702, 703, 28 U.S.C. 1361 and 28 U.S.C. 1651. The Administrative Procedures Act 5 U.S.C. 702 provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C. 703 of the same Act provides:

> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory in-

junction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

28 U.S.C. 1361 provides:

"The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U.S.C. 1651 provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

The plaintiffs contend that HUD failed to notify and give a reasonable opportunity for comment to the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. This, plaintiffs allege, violates 16 U.S.C. 470f and makes HUD (George Romney, Secretary) subject to mandamus action under 28 U.S.C. 1361 and subject to an injunction under 28 U.S.C. 1651. Plaintiffs further contend that the action of HUD would be reviewable under the Administrative Procedures Act. 5 U.S.C. 701 *et seq.*

Defendants deny these allegations and move the court to dismiss the complaint for the reason that plaintiffs lack

standing to raise the issues in controversy. This court holds that the plaintiffs lack standing.

It is clear from the outset that plaintiffs do not have standing under the recent doctrine established by the Supreme Court in Flast v. Cohen, 392 U. S. 83 (1968). Plaintiffs have established neither a logical link between their taxpayer status and the type of legislative enactment attached nor a nexus between their taxpayer status and the precise nature of the constitutional infringement alleged. Supra at 102-3. It is clear, therefore, that plaintiffs do not have standing solely on the ground of being federal taxpayers.

It is likewise clear that none of the plaintiffs have any real interest in this litigation. None of the plaintiffs own or have owned any of the seven buildings in controversy. None of the plaintiffs had legal control or title to the buildings when they were placed on the National Register. The Lexington Urban Renewal Agency had acquired title to these buildings in February, 1969, and the buildings were placed on the Register in July, 1969. None of the plaintiffs, though informed of the urban renewal plan's alternate use for historic preservation, submitted a proposal for development of the area. The plaintiffs' interest in the litigation is not sufficient to give them standing to bring a mandamus action under 28 U.S.C. 1361, an injunction under 28 U.S.C. 1651, or court review of administrative action 5 U.S.C. 701 *et seq.* They do not have a personal stake in the outcome. Norwalk Core v. Norwalk Redevelopment Agency, 395 F. 2d 920, 927 (2 Cir. 1968).

Any attempt to gain standing plaintiffs seek under the "private attorney general" doctrine must also fail. This doctrine as developed in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2 Cir. 1965); Office of Communication of United Church of Christ v. Federal Communication Commission, 359 F. 2d 994 (D.C.

Cir. 1966); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968); and Road Review Leage v. Boyd, 270 F. Supp. 650 (S.D. N.Y. 1967) seems to stand for the proposition that persons or groups who by their activities and conduct have exhibited a special intefest in areas involved in the suit may be included as parties aggrieved or adversely affected by agency action.

Such a doctrine provides standing under two circumstances: (1) when the plaintiffs are citizens of the area and their direct interests are to be affected, see Norwalk Core v. Norwalk Redevelopment Agency, supra; Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, supra; and (2) when the group seeking to represent the citizens has been actively engaged in the administrative process and has thereby shown a special interest in the area in controversy. Scenic Hudson Preservation Conference v. Federal Power Commission, supra; Road Review League v. Boyd, supra.

Plaintiffs in this action have met neither standard. Those plaintiffs who are citizens of the area, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis, have no interest in the seven buildings to be demolished in the 200 block of West High Street. The National Register for historic buildings has been in existence since 1966. Not until July 10, 1969, however, were any of these buildings placed on the Register. The Lexington urban renewal plan, since July, 1968, has provided an alternative use for historic preservation. None of the plaintiffs, however, have submitted such a plan. The plaintiffs have not sufficiently engaged in the administrative process to show a special interest in the controversy so as to be included among those parties aggrieved or adversely affected by agency action. See Green Street

Association v. Daley, 373 F. 2d 1 (7 Cir. 1967); Harrison-Halstead Community Group, Inc. v. Housing and Home Finance Agency, 310 F. 2d 99 (7 Cir. 1962); South Suburban Safeway Lines, Inc. v. City of Chicago, 285 F. Supp. 676 (N.D. Ill. 1968).

It is the conclusion of the court, therefore, that the plaintiffs lack standing to sue. If it had been concluded that plaintiffs had standing to invoke the jurisdiction of this court, dismissal of plaintiffs' complaint would still be in order.

If plaintiffs did have standing to bring this action, they could still not receive the relief they seek. The Lexington urban renewal plan, Ky. R-63, was first formulated in 1965 and was approved by HUD on June 7, 1966. At this time a "Loan and Capital Grant Contract" was entered into between HUD and Lexington Urban Renewal Agency. This plan was first amended in July of 1968 and provided for demolition of the buildings or an alternate use of historic preservation. This amendment was approved by HUD on October 18, 1968. The plan was again amended in January of 1969. The amendment carried the same provision as the first concerning demolition or preservation. This second amendment was approved by HUD on May 8, 1969. All of these contracts between the Lexington Urban Renewal Agency and HUD provided for the expenditure of federal funds for demolition of the buildings. At none of these times did any buildings in the plan area appear on the National Register for historic places. HUD was, therefore, under no duty to notify the Advisory Council on Historic Preservation. Rumors of buildings with historic significance is not enough to require HUD to take this action. Placement on the Register is what is required.

Based upon the loan and capital grant contracts, the Lexington Urban Renewal Agency sought proposals and bids for the property in question. These bids were to be

submited July 10, 1969. None of the plaintiffs submitted a proposal, but on the same day (July 10) placed the buildings on the National Register. Their contention that subsequent approval by HUD of demolition of some of these buildings without compliance with 16 U.S.C. 470f is without merit. 16 U.S.C. 470f and the duty contained therein refers only to times when plans or amendments to plans are authorized and resulting loan and capital grant contracts are entered between HUD and local urban renewal agencies. Any other construction of the statute would place too great a burden on the urban renewal administrative process. See Judge Thornton's opinion in Kent County Council for Historic Preservation v. George W. Romney, Civil Action No. 6174 (W.D. Mich. October 2, 1969). Even if plaintiffs did have standing, approval of the last amendment to the plan, Ky. R-63, was prior to the listing of the buildings on the National Register. Thus, 16 U.S.C. 470f imposed no duty on HUD to notify the Advisory Council on Historic Preservation.

The issues heretofore resolved are dispositive of the case at bar. There is, therefore no need to consider other allegations made by the parties.

It is the opinion of this court: (1) that the Temporary Restraining Order Entered on October 22, 1969, should be dissolved; (2) that the plaintiffs' motion for temporary injunction should be overruled, Nashville I-40 Steering Committee v. Ellington, 387 F. 2d 179 (6 Cir. 1967), cert. denied, 390 U. S. 921 (1968); Barron & Holtzoff § 1433; and, (3) that the motions to dismiss by all defendants should be sustained.

An order in accordance with this motion is this day entered.

(s) Mac Swinford,
Judge.

November 14, 1969.

APPENDIX "I"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2080

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., ET AL., - - - - - - - - *Plaintiffs,*

v.

GEORGE ROMNEY, ET AL., - - - - - *Defendants.*

ORDER—Entered and Filed November 14, 1969.

It is the Judgment of this court and is hereby ordered that:

(1) the Temporary Restraining Order heretofore issued by this court be dissolved upon entry of this Order;

(2) the plaintiffs' Motion for a Temporary Injunction is overruled; and

(3) the defendants' motion to dismiss be sustained and the Complaint as amended be dismissed.

See memorandum.

(s) Mac Swinford,
Judge.

November 14, 1969.

APPENDIX "J"

No. 19, 995

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., a nonprofit incorporated association of the Commonwealth of Kentucky; THE BLUEGRASS TRUST FOR HISTORIC PRESERVATION, INC., a nonprofit incorporated association of the Commonwealth of Kentucky; CURTIS HARRISON; MRS. STATHIS KAFOGLIS; MR. & MRS. W. T. DENNIS; on behalf of themselves and all other United States or Kentucky citizens, taxpayers, property owners, or historic preservation groups and persons similarly situated, - - - - - *Appellants,*

v.

GEORGE ROMNEY, Secretary of the United States Department of Housing and Urban Development,

THE CITY OF LEXINGTON, KENTUCKY; HONORABLE CHARLES WYLIE, Mayor of the City of Lexington; THE BOARD OF CITY COMMISSIONERS OF THE CITY OF LEXINGTON; JOSEPH GRAVES, Member of the Board; HARRY SYKES, Member of the Board; THOMAS UNDERWOOD, Member of the Board; FRED FUGAZZI, Member of the Board; URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, a municipal corporation; ROBERT E. FEATHERSTON, Chairman; WILLIAM R. EMBRY, Vice-Chairman; BYRON ROMAN-

owitz, Member; D. C. Noble, Member; H. J. Hagler, Member; Jennie Bryant, Director of the Urban Renewal and Community Development Agency of the City of Lexington,

Citizens Union National Bank and Trust Company, Inc., a Kentucky corporation; Norwood Construction Company, Inc., a Kentucky corporation; J. Norwood Hodge, President of Norwood Construction Company, - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

OPINION—Decided and Filed November 24, 1969.

Before: Phillips, Chief Judge, and Peck and Combs, Circuit Judges.

Per Curiam. The subject matter of this action, which has come on for consideration by this panel at the direction of the Chief Judge, has been the core of a controversy which has seen the parties at odds in both administrative and judicial proceedings. The latter have included an action in the courts of the Commonwealth of Kentucky with review by its Court of Appeals, sitting en banc, with negative results to the plaintiffs, and an action with a similar conclusion in the District Court, from which the present appeal was perfected.

The ultimate aim of the plaintiffs is the protection from demolition of fourteen buildings, claimed to be of historic significance, which stand in an area designated for improvement under the Urban Renewal Plan of the City of Lexington, Kentucky, all as appearing in detail in the documents before us, as will be later herein commented upon.

The matter is before this Court for consideration of certain motions, the first of which is the plaintiffs-appellants'

Motion for Injunction Pending Appeal. Subsequent motions include defendants-appellees' Motion to Require Plaintiffs to File Bond, which will not herein be considered for reasons which will be later apparent, and the motion of certain appellees for an order denying injunctive relief pending appeal. We choose to and will consider the latter motion as a motion to affirm the judgment of the District Court and as having been filed under the provisions of Rule 8(b) of the Rules of this Court.* The propriety of such consideration as well as the fact that appellants have been apprised of such nature of the motion will readily appear from Branch (2) of the motion and from the conclusion of the memorandum in support thereof wherein "it is respectfully concluded that this court should deny the injunctive relief requested by the Appellants *and affirm the Order of the District Court.* . . ." (Emphasis supplied.) Responsive to our requests, counsel have with expedition and obvious diligence favored us with exhaustive briefs which have been most helpful in acquainting the Court with the facts and offering citations to applicable legal principles. Without implying criticism but rather to illustrate the breadth of the factual presentation before us, we observe that the briefs, perhaps particularly those of the appellants, go occasionally outside the record, and offer averments not otherwise evidenced. To the extent that they are germane to our consideration, however, all uncontroverted representations have been taken into account.

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*Rule 8—MOTION TO DISMISS OR AFFIRM. Within fifteen days after the appeal has been docketed in this court, the appellee may file a motion to dismiss or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss. . . .

"(b) The court will receive a motion to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. . . ."

We thus note the contention of the appellees in the motion we consider as one to affirm to the effect that "unless this appeal is fully and finally disposed of prior to November 28, 1969, the Urban Renewal Plan of the City of Lexington, Kentucky, will be placed in grave jeopardy and probably destroyed."

The Order from which this appeal was perfected was entered by Judge Mac Swinford in the United States District Court for the Eastern District of Kentucky, and was accompanied by an exhaustive Memorandum. Rather than restate, paraphrase or extensively quote from that Memorandum, due to the exigencies of time urged upon us by all parties, we attach Judge Swinford's Memorandum hereto as Appendix A. In addition to the authorities cited in that memorandum, reference is made to this Court's opinion in *Moist* v. *Belk*, 380 F. 2d 720, *cert. denied*, 389 U. S. 960 (1967). It is here determined that the District Court properly dissolved the Temporary Restraining Order previously entered by it, overruled the plaintiffs' Motion for a Temporary Injunction and sustained the defendants' Motion to Dismiss and dismissed the complaint as amended, and it is further here determined that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and that therefore the motion to affirm is well taken and should be sustained.

The judgment of the District Court is affirmed.

APPENDIX A

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
Lexington
No. 2080

South Hill Neighborhood Association, Inc., Et Al., - - - - - - - - Plaintiffs,

v.

George Romney, Et Al., - - - - Defendants.

MEMORANDUM.

Plaintiffs in this action allege that George Romney, Secretary of United States Department of Housing and Urban Development, failed to notify the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. 16 U.S.C. 470.

This case is before the court on plaintiffs' motion for a temporary injunction and defendants' motions to dismiss the complaint. A full disclosure and discussion of the parties and facts which led to this controversy are imperative to a ruling on these motions.

The parties to this action include: Plaintiffs (1) South Hill Neighborhood Association, Inc. (South Hill), a non-profit Kentucky corporation having as one of its purposes the preservation of historical buildings; (2) The Bluegrass Trust for Historic Preservation, Inc. (Bluegrass Trust) a non-profit Kentucky corporation having as one of its pur-

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The facts out of which this controversy arises are as follows. The Lexington Urban Renewal Agency was formed in 1959 and has continued in existence to date. On April 1, 1965, the Board of City Commissioners of the City of Lex-

ington adopted an ordinance describing area in downtown Lexington to be appropriate for an urban renewal project. An urban renewal plan was promulgated for this area and said plan was approved by the Planning and Zoning Commission of Lexington-Fayette County at a public hearing on July 22, 1965. Notice of this plan was given to each property owner in the area bounded on the north by Main Street, on the west by Patterson Street, on the south by High Street, and on the east by Shreve Avenue. This includes the area in controversy. The method of financing costs for this project was authorized by the Kentucky Court of Appeals on October 1, 1965. See Watkins v. Fugazzi, 394 S. W. 2d 594 (Ky. 1965).

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On July 22, 1968, the plan for the Lexington urban renewal project, R-63, was amended. This amendment to the 1965 plan provided for a Civic Center in an area bounded by Main, Patterson, High and Broadway Streets, and provided for an alternative use of historic preservation in the north half of the 200 block of West High Street. Seven of the buildings involved in this action are in the area with historic preservation designated as an alternate use. Any plan submitted for historic preservation was to meet standards which were explained at public meetings. If the buildings were not restored, they were to be demolished. HUD approved this first amendment on October 18, 1968.

In January, 1969, the urban renewal plan, Ky. R-63, was again amended by Lexington Urban Renewal Agency. This amendment provided for an increased expenditure of federal funds, a change in alignment of streets in the area. This amendment retained, however, the alternative use for historic preservation as contained in the July, 1968, plan and amendment. HUD approved this second amendment on May 8, 1969.

On May 9, 1969, and June 29, 1969, public advertisements appeared in newspapers inviting competitive proposals to be submitted for part of the land contained in the urban renewal plan, R-63. These proposals were formally opened before the Lexington Urban Renewal Agency on July 10, 1969. Two proposals were submitted at this time. One was from Citizens Union Bank and proposed construction of a $4,000,000.00 to $8,000,000.00 multi-story bank and office building which would ultimately employ one thousand persons. This proposal was determined by the Lexington Urban Renewal Agency to comply with their requirements. The other proposal came from Historic Lexington, Inc. (not a party to this action but of a class which plaintiffs purport to represent). Historic Lexington, Inc.'s proposal was for restoration of the buildings in this area. This proposal was determined by the Lexington Urban Renewal Agency to not be in compliance with their requirements. Historic Lexington, Inc. was notified of the plan's deficiencies and was given an opportunity to correct. Such corrections were not made.

Fourteen buildings in the Lexington urban renewal area were denominated "West High Street Historic District" and on July 10, 1969, were placed on the National Register of historical places. 16 U.S.C. 470. Official notice of this listing appeared on August 5, 1969 in 34 Federal Register.

On July 18, 1969, the Lexington Urban Renewal Agency voted to accept the proposal submitted on July 10, 1969, by

the Citizens Union Bank. On July 29, 1969, the regional HUD director notified the Lexington Urban Renewal Agency that he had "no objection to a disposal to the proposed redeveloper." Exhibit 11 of October 28, 1969, deposition of Jennie F. Bryant. The proposal of the Citizens Union Bank was accepted by the Lexington Urban Renewal Agency on September 3, 1969, and on that date a contract was entered into between the parties. The contract required the land to be cleared of all improvements. The deed to the property was tendered on October 1, 1969.

In September, 1969, the Lexington Urban Renewal Agency had advertised for demolition bids for buildings on the property sold to Citizens Union Bank. On October 14, 1969, Jennie Bryant, director of Lexington Urban Renewal Agency, received verbal approval from HUD for demolition of the seven buildings on the 200 block of High Street by Norwood Construction Co. That same day the demolition bid of Norwood Construction Co. was accepted. The demolition contract was entered into between the parties on October 15, 1969. During the evening of October 15, 1969, and the morning of October 16, 1969, demolition was begun on the buildings. This demolition completely destroyed one building and damaged two others.

Court action on this controversy has been in the Fayette County Circuit Court and this court. On October 16, 1969, substantially the same plaintiffs commenced action against substantially the same defendants, with the exception of George Romney. A temporary restraining order was issued to prohibit further demolition of the buildings by Norwood Construction Co. Judge Park of the Fayette Circuit Court on October 21, 1969, entered findings of fact and conclusions of law which dismissed the plaintiffs' complaint for failure to state a claim upon which relief could be granted. In dismissing the complaint and dissolving the restraining order, Judge Park said "this is a final judgment insofar as the plaintiffs' cause of action is concerned." South Hill

Association, Inc. et al. v. Urban Renewal and Community Development Agency of the City of Lexington, et al., Fayette Circuit Court First Division No. 25992, Judgment of October 21, 1969. On October 22, 1969, the Kentucky Court of Appeals, sitting en banc, overruled plaintiffs' motion for interlocutory injunctive relief pending appeal.

Action was commenced in this court on October 17, 1969. A temporary restraining order was issued by this court on October 23, 1969, and a hearing was held October 31, 1969. At this hearing it was ordered that the parties enter findings of fact and conclusions of law from which this court could enter a judgment. Federal Rules of Civil Procedure 52. This has been done.

Relief requested in plaintiffs' amended complaint seeks: (1) a preliminary injunction and a permanent injunction without bond—a) against federal defendants enjoining them, including withdrawal of prior approval of funds, to remove or destroy the fourteen buildings in question until the court shall determine they have complied with federal law; b) to restrain federal and local defendants from taking steps to demolish or remove buildings in controversy, including affirmative orders to prevent private defendants from carrying out acts; c) to restrain private defendants from demolishing, destroying, or removing said building; (2) a declaration of rights among parties and reformation of contracts, deeds and agreements relating to destruction of buildings; (3) an order for defendants to reconstruct and repair damaged buildings; (4) an order for federal defendant to refer the matter to Advisory Council on Historic Preservation for comment and for recommendations; (5) court declaration that plaintiffs have rights arising under National Historic Preservation Act and National Housing Act and for court to issue mandamus against federal defendant ordering him to do his duties under the Act; (6) a grant of judicial review of action taken by HUD and Lex-

ington Urban Renewal Agency in undertaking to demolish said buildings; and, (7) all other appropriate relief to which the plaintiffs may be entitled.

The defendant, George Romney (HUD), has moved to dismiss the complaint on the grounds that: (1) plaintiffs lack standing to sue; (2) defendant has no authority over demolition; and, (3) plaintiffs have no right to a hearing.

The remaining defendants move to dismiss plaintiffs' complaint on the grounds: (1) that the complaint fails to state a claim upon which relief can be granted; (2) that plaintiffs are not real parties in interest and have no standing or capacity to bring this action; (3) that this court lacks jurisdiction because it appears on the face of the complaint that plaintiffs state no claim under the Constitution, Laws or Treaties of the United States; (4) that all matters and issues herein involved have been fully determined by the proceedings in state court; and, (5) that the plaintiffs are guilty of laches, waiver and are estopped from enforcing any right or remedies they may have under law.

Plaintiffs attempt to invoke the jurisdiction of this court under 28 U.S.C. 1331(a) by alleging that the amount in controversy exclusive of interest and costs exceeds $10,000 and that the claim arises under the Constitution, law or treaties of the United States. More specifically plaintiffs allege their claims arise under the National Historic Preservation Act of 1966, 16 U.S.C. 470f; the Housing Act of 1949 as amended, 42 U.S.C. 1451(c), (e), 1455(e), 1456(c)(6), (7), 1460(c); the Administrative Procedures Act, 5 U.S.C. 702, 703; 28 U.S.C. 1361; and 28 U.S.C. 1651.

In 1966, Congress enacted the National Historic Preservation Act. 16 U.S.C. 470 *et seq.* Congress found "that the spirit and direction of the Nation are founded upon and reflected in its historic past;" and "that the historical

and cultural foundations of the Nation should be preserved. . . ." 16 U.S.C. 470(a), (b). To implement this policy, Congress provided in 16 U.S.C. 470f that:

> "The head of any Federal Agency having direct or indirect jurisdiction over a proposed . . . federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any . . . building, structure, or object that is included in the National Register. The head of any such Federal Agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."

Congress amended the National Housing Act of 1949 so that it would be compatible with the National Historic Preservation Act. See 42 U.S.C. 1460(b)(2), 1460(c)(6), 1460(c)(9), 1460(c)(10).

In maintaining this action plaintiffs seek to couple the before described policy of historic preservation with 5 U.S.C. 702, 703, 28 U.S.C. 1361 and 28 U.S.C. 1651. The Administrative Procedures Act 5 U.S.C. 702 provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C. 703 of the same Act provides:

> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory

judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

28 U.S.C. 1361 provides:

"The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U.S.C. 1651 provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

The plaintiffs contend that HUD failed to notify and give a reasonable opportunity for comment to the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. This, plaintiffs allege, violates 16 U.S.C. 470f and makes HUD (George Romney, Secretary) subject to mandamus action under 28 U.S.C. 1361 and subject to an injunction under 28 U.S.C. 1651. Plaintiffs further contend that the action of HUD would be reviewable under the Administrative Procedures Act. 5 U.S.C. 701 *et seq.*

Defendants deny these allegations and move the court to dismiss the complaint for the reason that plaintiffs lack standing to raise the issues in controversy. This court holds that the plaintiffs lack standing.

It is clear from the outset that plaintiffs do not have standing under the recent doctrine established by the Supreme Court in Flast v. Cohen, 392 U. S. 83 (1968). Plaintiffs have established neither a logical link between their taxpayer status and the type of legislative enactment attached nor a nexus between their taxpayer status and the precise nature of the constitutional infringement alleged. Supra at 102-3. It is clear, therefore, that plaintiffs do not have standing solely on the ground of being federal taxpayers.

It is likewise clear that none of the plaintiffs have any real interest in this litigation. None of the plaintiffs own or have owned any of the seven buildings in controversy. None of the plaintiffs had legal control or title to the buildings when they were placed on the National Register. The Lexington Urban Renewal Agency had acquired title to these buildings in February, 1969, and the buildings were placed on the Register in July, 1969. None of the plaintiffs, though informed of the urban renewal plan's alternate use for historic preservation, submitted a proposal for development of the area. The plaintiffs' interest in the litigation is not sufficient to give them standing to bring a mandamus action under 28 U.S.C. 1361, an injunction under 28 U.S.C. 1651, or court review of administrative action 5 U.S.C. 701 *et seq.* They do not have a personal stake in the outcome. Norwalk Core v. Norwalk Redevelopment Agency, 395 F. 2d 920, 927 (2 Cir. 1968).

Any attempt to gain standing plaintiffs seek under the "private attorney general" doctrine must also fail. This doctrine as developed in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2 Cir.

1965); Office of Communication of United Church of Christ v. Federal Communication Commission, 359 F. 2d 994 (D.C. Cir. 1966); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968); and Road Review Leage v. Boyd, 270 F. Supp. 650 (S.D. N.Y. 1967) seems to stand for the proposition that persons or groups who by their activities and conduct have exhibited a special interest in areas involved in the suit may be included as parties aggrieved or adversely affected by agency action.

Such a doctrine provides standing under two circumstances: (1) when the plaintiffs are citizens of the area and their direct interests are to be affected, see Norwalk Core v. Norwalk Redevelopment Agency, supra; Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, supra; and (2) when the group seeking to represent the citizens has been actively engaged in the administrative process and has thereby shown a special interest, in the area in controversy. Scenic Hudson Preservation Conference v. Federal Power Commission, supra; Road Review League v. Boyd, supra.

Plaintiffs in this action have met neither standard. Those plaintiffs who are citizens of the area, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis, have no interest in the seven buildings to be demolished in the 200 block of West High Street. The National Register for historic buildings has been in existence since 1966. Not until July 10, 1969, however, were any of these buildings placed on the Register. The Lexington urban renewal plan, since July, 1968, has provided an alternative use for historic preservation. None of the plaintiffs, however, have submitted such a plan. The plaintiffs have not sufficiently engaged in the administrative process to show a special interest in the con-

troversy so as to be included among those parties aggrieved or adversely affected by agency action. See Green Street Association v. Daley, 373 F. 2d 1 (7 Cir. 1967); Harrison-Halstead Community Group, Inc. v. Housing and Home Finance Agency, 310 F. 2d 99 (7 Cir. 1962); South Suburban Safeway Lines, Inc. v. City of Chicago, 285 F. Supp. 676 (N.D. Ill. 1968).

It is the conclusion of the court, therefore, that the plaintiffs lack standing to sue. If it had been concluded that plaintiffs had standing to invoke the jurisdiction of this court, dismissal of plaintiffs' complaint would still be in order.

If plaintiffs did have standing to bring this action, they could still not receive the relief they seek. The Lexington urban renewal plan, Ky. R-63, was first formulated in 1965 and was approved by HUD on June 7, 1966. At this time a "Loan and Capital Grant Contract" was entered into between HUD and Lexington Urban Renewal Agency. This plan was first amended in July of 1968 and provided for demolition of the buildings or an alternate use of historic preservation. This amendment was approved by HUD on October 18, 1968. The plan was again amended in January of 1969. The amendment carried the same provision as the first concerning demolition or preservation. This second amendment was approved by HUD on May 8, 1969. All of these contracts between the Lexington Urban Renewal Agency and HUD provided for the expenditure of federal funds for demolition of the buildings. At none of these times did any buildings in the plan area appear on the National Register for historic places. HUD was, therefore, under no duty to notify the Advisory Council on Historic Preservation. Rumors of buildings with historic significance is not enough to require HUD to take this action. Placement on the Register is what is required.

Based upon the loan and capital grant contracts, the Lexington Urban Renewal Agency sought proposals and

bids for the property in question. These bids were to be submited July 10, 1969. None of the plaintiffs submitted a proposal, but on the same day (July 10) placed the buildings on the National Register. Their contention that subsequent approval by HUD of demolition of some of these buildings without compliance with 16 U.S.C. 470f is without merit. 16 U.S.C. 470f and the duty contained therein refers only to times when plans or amendments to plans are authorized and resulting loan and capital grant contracts are entered between HUD and local urban renewal agencies. Any other construction of the statute would place too great a burden on the urban renewal administrative process. See Judge Thornton's opinion in Kent County Council for Historic Preservation v. George W. Romney, Civil Action No. 6174 (W.D. Mich. October 2, 1969). Even if plaintiffs did have standing, approval of the last amendment to the plan, Ky. R-63, was prior to the listing of the buildings on the National Register. Thus, 16 U.S.C. 470f imposed no duty on HUD to notify the Advisory Council on Historic Preservation.

The issues heretofore resolved are dispositive of the case at bar. There is, therefore no need to consider other allegations made by the parties.

It is the opinion of this court: (1) that the Temporary Restraining Order Entered on October 22, 1969, should be dissolved; (2) that the plaintiffs' motion for temporary injunction should be overruled, Nashville I-40 Steering Committee v. Ellington, 387 F. 2d 179 (6 Cir. 1967), cert. denied, 390 U. S. 921 (1968); Barron & Holtzoff § 1433; and, (3) that the motions to dismiss by all defendants should be sustained.

An order in accordance with this motion is this day entered.

(s) Mac Swinford,
Judge.

November 14, 1969.

APPENDIX "K"

1

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON, KENTUCKY

South Hill Neighborhood Association, Inc., Etc., and
Curtiss Harrison, Et Al., - - - - - *Plaintiffs,*

v.

George Romney, Et Al., - - - - - *Defendants.*

DEPOSITION OF FRANK J. GROSCHELLE.

Deponent: Frank J. Groschelle.
Date: October 27, 1969.

Stephen R. Pyevac, Reporter.

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The deposition of FRANK J. GROSCHELLE, taken on discovery, pursuant to notice heretofore filed, in Room 157, State Capitol Building, Frankfort, Kentucky, on October 27, 1969, at 9 A.M., and to be used in accordance with the Federal Rules of Civil Procedure.

Appearances.

For the Plaintiffs: Mr. Roger B. Sledd,
Lexington, Kentucky,

Professor Eugene F. Mooney,
Lexington Kentucky.

For the Defendants:

Urban Renewal &
Community Dev. Agency
of the City of Lextington,

Robert E. Featherston,

William R. Embry,

Byron Romanowitz,

D. C. Noble,

H. J. Hagler,

Jennie Bryant,

Mr. J. Montjoy Trimble,
Mr. C. Thomas Greene,
Lexington, Kentucky.

* * * * * * *

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Q. In connection with the National Historic Preservation Act is there any sort of a Committee or Board of Review or any such organization which assists you in discharging your duties?

A. There is a counterpart, an organization that has been and was submitted, the names of which were submitted, excuse me, to the United States Department of Interior Park Service for their approval as a Committee. And this is in

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these records as to when that was submitted.

Q. Who are the members of the Committee at the present date?

A. I will have to look.

Q. Refer to those.

A. (Referring to documents.)

(Off the record remarks.)

A. Presently there are six members. Mrs. Millard Cox of 21 River Hill Road, Louisville, Kentucky.

Mr. Earl D. Wallace, 1211 Richmond Road, Lexington, Kentucky.

Mr. Howard C. Lawson, Jr., Bureau of State Planning, Bush Building, Frankfort, Kentucky.

This is my representative too and he is present.

Mr. Charles N. Bayless, 620 Euclid Avenue, Lexington, Kentucky.

Mr. Subleth Walton, 2206 Frankfort Avenue, Louisville, Kentucky.

Doctor Henry F. Dobyens, 212 Bradley, University of Kentucky, Lexington, Kentucky.

There were two other members of the National Register Review Board, one member—excuse me, correction, William B. Floyd, Walnut Street,

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Lexington, Kentucky, who is now in Washington, employed there and is no longer a member of the Board and Curtis B. Harrison, formerly served as Secretary and he is, was or is with the Department of Finance.

* * * * * * *

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Q. Mr. Groschelle, would you identify what has been marked as Defendants' Exhibit number three?

A. (Referring to document) A letter from William J. Murtaugh, Keeper of the National Register, United States Department of the Interior, National Park Service, Office of Archaeology and Historic Preservation, a letter indicating that the Review Board of Kentucky with the addition of Mr. Henry F. Dobyens has been approved by this office.

Q. Now, both that Exhibit number three and Exhibits one and two are part of the records of your office, are they not, Mr. Groschelle?

A. Yes, sir.

Q. This letter dated July 2, 1969, the Defendants' Exhibit three states: (Reading aloud).

"In addition to this Review Board

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the Grants Guide calls for a professional staff to undertake a State-wide historic sites survey."

Who are the members of the professional staff who undertook a State-wide histhoric sites survey, Mr. Groschelle?

A. This material on the survey was submitted to the, I suspect, Ad Hoc Group prior to that date for their disposition and as of that date and as of today, there is no such animal.

Q. Your testimony is that there is no professional staff who has ever undertaken a State-wide historic sites survey?

A. That is right.

Q. As I take it, the only action of the Commonwealth of Kentucky is that to have appointed you as a State Liasison Officer?

A. (Nodding head in the affirmative.)

Q. And to establish a Review Board for Kentucky?

A. (Nodding head in the affirmative.)

Q. Neither the Governor nor your office nor any other office of the Commonwealth of Kentucky then has undertaken to appoint a professional

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staff to undertake a State-wide historic sites survey?

A. Names have been submitted but to date no professional qualifications of the staff have been submitted to the Department of Interior.

Q. Your testimony is that there is no staff at this time?

A. (Nodding head in the affirmative.)

Q. When was Mr. Curtiss Harrison first appointed to the State Review Roard?

A. He never was. He served as a Secretary for the,

never a member of the Review Board. He simply served as Secretary and Liaison between the Kentucky Heritage Commission and the State Review Board, served as their Secretary.

Q. What were the circumstances surrounding his appointment as Secretary to the Review Board?

Mr. Sledd: Note an objection to the question, of the, for the Plaintiff Curtiss Harrison, on the grounds that, that it is irrelevant and, as it affects the placing of the buildings in question on the National Register.

Q. My question, Mr. Groschelle, was state the circumstances surrounding the appointment

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of Mr. Harrison as Secretary to the Review Board. You do appoint him to the Board?

A. Yes or—no,—no,—no, excuse me, no. We simply asked him to serve as Secretary.

* * * * * * *

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Q. Is Mr. Harrison still connected with the Board of, Review Board of Kentucky?

A. He is not as of—I guess you want a date?

Q. Yes, I would like to know the date when he quit performing that function.

A. (Referring to records) August 22, 1969.

* * * * * * *

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Q. What happened that night at Bluegrass Field?

A. Mr. Harrison and Mr. John Vanderwier.

Q. Who is Mr. Vanderwier?

A. Mr. Vanderwier is a member of my staff and serves in the present capacity as Special Assistant for Housing and Community Developments.

Q. Okay. What was his capacity on the night of July 9, 1969?

A. Director of the Division of Development, Information or Development Assistant, excuse me.

Q. Now, tell me what happened that night at Bluegrass Field?

A. Mr. Vanderwier and Mr. Harrison met me out there at the airport as I was coming off the plane from Washington, D. C. and stated to me that,—

Q. Who stated to you, Mr. Groschelle?

A. Mr. Vanderwier, that Mr. Harrison

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had brought some papers over to the airport for me to sign. I felt that, at 10:30 at night I thought it could have been done the next morning at the office. And I asked why here at the airport.

Then was informed by Mr. Harrison that he was catching a morning flight to Washington with the application papers to present them to the National Historic Preservation Trust for inclusion on the National Register.

I asked Mr. Harrison if the Committee hadn't met and approved this particular application for submission to the National Register and was informed by Mr. Harrison that this was true and correct.

I queried Mr. Vanderwier as to whether this was true and correct and he said as far as he knew it was.

And I said, "Did you attend the meeting," and he said, "No, I did not. Mr. Harrison has assured me that this action was taken by the Kentucky Historic Society Preservation Review Board."

Mr. Harrison informed me that if I would sign these that we could get them to Washington tomorrow and had been assured that he could get this parcel placed on the Federal Register. He likewise said that the Lexington Urban Renewal

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office would attempt to indicate a project for the utilization of these properties, either the next day or the 11th, and

that—I don't know what the term is, the—that the Urban Renewal Office really did not have a bona fide project and that putting this on the National Register would, would indicate or would seek a response from Urban Renewal administration as to whether they had a valid project or not.

On the good faith of Mr. Harrison and good faith of Mr. Vanderwier of my staff I signed this particular document, the application for inclusion on the Federal Register.

Mr. Harrison did take it to Washington the following day and it was placed on the National Registration effective the 10th of July, 1969, the day prior to the Urban Renewal office taking bids on the properties.

Q. For the record and for your information, Mr. Groschelle, the bids were taken on the, on the morning of the 10th?

A. (Nodding head in the affirmative.)

Q. And did either Mr. Vanderwier or Mr. Harrison inform you that Urban Renewal was opening bids for proposal for the property on the

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next morning?

A. Mr. Harrison did,—correction here, wait a minute. They would be taking bids was the statement that was made to me.

Q. Did either of them tell you that they were being taken on the next morning, the morning of the 10th, that they were being opened the next morning, the morning of the 10th?

A. Question, opened or taken means two separate things to me. Taken and would be opened sometime later.

Q. Did either of those persons tell you that the bid opening was going to be in the morning, July 10th?

Mr. Sledd: Note an objection to that question for the plaintiff for the reason that it is irrelevant, incompetent and immaterial to the placing of these buildings on the National Register.

Q. Answer the question, Mr. Groschelle.

A. Question being taken—they were taking bids?

Q. No. The question is: Did either Mr. Harrison or Mr. Vanderwier tell you that bids were being opened by Urban Renewal?

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A. No.

Q. On the morning of July 10th?

A. No.

Q. Mr. Groschelle, have you ever at any time made any statements to any persons to the effect that you were duped into signing these documents by Mr. Harrison and Mr. Vanderwier?

Mr. Sledd: Note an objection of the Plaintiff to that question.

Mr. Trimble: This is discovery deposition, Mr. Sledd, and I have a right to ask any question which might lead to the, to the discovery of relevant evidence showing the good faith of your clients.

Q. Now, answer the question, Mr. Groschelle.

Mr. Sledd: Well, I will note the objection of Plaintiff to that question and I would move that that question be certified to the Court and have a ruling from the Court as to whether or not Mr. Groschelle has to answer that question on the basis that once these buildings do appear upon the National Register and once Mr. Groschelle—and records are produced to show that Mr. Groschelle in the normal course and duties of his office had

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signed such documents that the Urban Renewal Commission or any other person cannot go behind those records as they appear on their face and that they speak for themselves.

Mr. Trimble: Well, I object to your testimony, Mr. Sledd.

Q. The question is, Mr. Groschelle, and you can answer the question: Whether or not since July 9, 1969 you ever said to any person that you were duped into signing these papers by Mr. Vanderwier and Mr. Harrison or have you said any words to that effect to any person?

A. Words to that effect?

Q. Yes sir, yes sir, either used the phrase duped or words to that effect?

A. I have used the phrase and corrected it at that particular point because duped is a little bit too strong.

Q. Well, what did you say and to who?

A. I—well, it would be difficult. I have said it to a number of persons. I have—

Q. (Interrupting) For example?

A. Mrs. Jennie Bryant most recently.

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Q. And what did you say to Mrs. Jennie Bryant recently?

A. That I felt that I had some misgivings and the record will indicate that I have had some misgivings after signing the document on July 9th about the manner in which that particular application was handled.

I even used the term and I am sure that in her deposition I hope that she will, in her deposition, remember that I corrected that particular term being duped. The record will indicate my actions as a result of that signing of that document, on July 9th. I did say to Mr. Bryant—Mrs. Bryant, excuse me, last week, Tuesday, I think, or Wednesday, Tuesday—I wasn't here on Wednesday, that I had misgivings about signing it because the manner in which it was brought to me, the later research that I took upon myself as a Staff Director to determine just what was going on.

This is just one of the duties that I performed and had not given it my full attention at that particular time.

I have discussed it with a number of people.

Q. Is it your testimony that you could have used that phrase "I was duped into signing

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these papers," or some similar phrase to other persons than Mrs. Jennie Bryant?

A. I have.

Q. You have stated that you conducted some research to find out what was going on?

A. Yes.

Q. What did you find out as a result of your research, Mr. Groschelle?

A. Prior to this happening, I had sent memorandums from this office to the Historic Survey and Review Committee requesting that there be certain operational procedures established by this particular Review Board. That these procedures be established and keeping with the information we had sent to the Keeper of the National Register. Certain procedures to be followed that after looking into it on, beginning on July 10th that I did not believe that these procedures had been followed.

April 14th was the date I am looking for.

Q. Of what year?

A. 1969.

Q. The letter with carbon copy to Mr. Curtiss Harrison in which this letter to Mr.

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Murtaugh, Keeper of the National Register, the letter states that I am forwarding how we as in Kentucky would intend to operate to meet the requirements of the National Historic Preservation Act of '66 until the Board and its operational procedures were formally established.

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Mr. Trimble: Would you read the question back, Steve, please.

The Reporter: (Reading aloud.)

"Q. After you investigated the matter of the registration of these properties on West High Street in Lexington, did you find that the procedures established by you had been followed?"

Q. Would you answer the question, Mr. Groschelle?

A. I did not find that they had been followed.

Q. Your testimony is that the procedures had not been followed?

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A. Correct.

Q. Mr. Vanderwier and Mr. Harrison at the airport in the late evening of July 9, 1969 had assured you that your procedures had been followed, had they not?

A. Yes, I presumed that.

Q. Well, I believe your testimony was that Mr. Harrison said that they had been followed and Mr. Vanderwier said that they had been followed insofar as he knew?

A. Well, the question was to them had the Board given this their voting approval and support, the presumption on my part is that they had followed the procedures to get to that place where they voted to submit the application.

* * * * * * *

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Mr. Trimble: Mark this.

(Whereupon Defendants' Exhibit #13 was duly received, marked and made a part of the record herein.)

Q. Will you identify, Mr. Groschelle, what has been marked as Defendants' Exhibit thirteen?

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A. Exhibit thirteen is a telegram which I sent to the Advisory Council for Historic Preservation on October 20, 1969, requesting them to investigate, to consider and comment to HUD Housing and Urban Development, the pro-

posed removal of several buildings on West High Street in Lexington, Kentucky. And council was further requested to explore all possibilities and make recommendations for preserving the historical significance of this area.

Q. To whom did you send copies of that telegram?

A. S. K. Stevens, Director, Pennsylvania Historical Commission, Harrisburg, Pennsylvania, who was Chairman of that Advisory Council.

Judge Max Swinford, Federal District Court in Covington, Kentucky.

Judge James Park, Jr., of Fayette County, Lexington, Kentucky.

Professor Eugene F. Mooney, College of Law, University of Kentucky, and to Eugene F. Mooney of the Federal District Court.

Q. How did you happen to send copies of that telegram to those people you just mentioned, Mr. Groschelle

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A. I was requested to consider the position of both the Plaintiff and the Defendants in this particular case, requested to further extend the opportunity for both of these parties to hopefully to arrive, and hopefully to arrive at some sort of a compromise circumstance. And I felt, if I may add this, counselor, I felt that this is an obligation that I had normally to keep the community from getting a distorted view with one another.

To, and also to attempt to cause a compromise circumstance to be arrived at.

Q. Well, when you sent this telegram on October 20, 1969, Mr. Groschelle, were you aware that there were two lawsuits pending between these parties, one in State Court and one in Federal Court?

A. I don't know that I was aware of two. I knew there was one pending with Judge Park's Court.

Q. Well, I note that you sent a copy to District Judge Max Swinford.

A. Yes, sir.

Q. Federal District Court, Covington, Kentucky.

A. Yes.

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Q. How did you happen to send copies of this telegram to Judge Max Swinford and Judge James Park, Jr.

A. As I said, I was requested by Counsel for the, which one is it—

Q. Preservationists.

A. Yes.

Q. Who made that request of you?

A. Mr. Mooney.

Q. And how did Mr. Mooney make that request?

A. That it would—

Q. (Interrupting) By in person or by phone call is what I would like to know?

A. Oh—oh, I see. By phone call, yes.

Q. When did you receive that call?

A. Who has got a calendar?

Q. I would like for you to pinpoint the date and time as close as possible. If you need to refer to any record or memos of telephone calls, received in the office, I would like for you to establish it as best you can.

A. (Referring to calendar) Sunday the 19th of October, approximately 9:30 P.M.

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Q. In the evening?

A. Yes, sir.

Q. You were home, I take it?

A. I was home.

Mr. Sledd: Note the objection.

Q. You keep a record of phone calls that you receive?

Mr. Sledd: Note the objection of the Plaintiff to this line of questions and the motion of the Plaintiff that all questions relating to the request of Mr. Groschelle to send

any telegrams be stricken from the record of this deposition for the reason that Mr. Groschelle in sending whatever telegrams he sent, sent them as in his capacity as State Liaison Officer for the Kentucky Historic Preservation and that any decision made to send them was his decision in that capacity and not based on the request of Plaintiffs' counsel.

Q. Mr. Groschelle, I take it you received the call from Mr. Eugene F. Mooney, Professor at the College of Law, University of Kentucky, in the evening of Sunday, October—

A. 19th.

Q. 19, 1969. Is that right, sir?

A. That's right.

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Q. And which he suggested to you that you send the telegram to certain people?

A. The words he suggested—

Q. Yes, asked you or you picked the words, sir?

* * * * * * *

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Q. How did it come about Mr. Groschelle, that you sent copies of this telegram to District Judge Max Swinford and Judge James Park, Jr. of the Fayette Circuit Court?

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A. When my client talked to Mr. Mooney he suggested that, he also informed me that he would be going to Covington, Kentucky, the next day and that if I would see fit to send this telegram that he would appreciate having it sent to Judge Swinford and himself in Covington.

Q. Why did you send a copy of Judge James Park, Jr.?

A. As Mr., at counselor Mooney's suggestion.

Q. Did Mr. Mooney inform you that there was then

two actions pending, one in State Court of Kentucky and one in the United States Federal District Court?

Mr. Sledd: Note an objection of Plaintiff to that question for the reason it has previously been asked and that the witness has already answered. That at the time Mr. Mooney talked to him he did not recall whether Mr. Mooney had said that the actions were pending in the State Court and Federal Court or not.

Mr. Trimble: I am going to ask the question again, Mr. Sledd, and I would appreciate you not suggesting to the witness how to answer my questions.

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A. To the best of my knowledge and remembrance, I do not know that there was either suggestion that they were pending. I knew that it was pending.

Q. You read the newspapers, don't you?

A. I knew newspaper coverage in the, in Judge Park's Court to the best of my recall.

Q. Is that why you sent the copy to Judge Park because you knew it was pending in State Court or did you send the telegram to Judge Park because Mr. Mooney suggested that you send it to him?

A. No. I sent it in order to—

Q. (Interrupting) Now, I don't know what—I don't want to know why you sent it, Mr. Groschelle. My question is—

Mr. Sledd: (Interrupting) Now, I am going to object unless you let him answer the question. You have asked the question and now give him a chance to answer it.

Q. My question—

Mr. Trimble: (Interrupting) Well, I am asking the question, Mr. Sledd. You can object all you want to.

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Mr. Sledd: And I am going to object to your interruption of the witness until he has completed his answer.

He is attempting to be responsive to your questions and he doesn't have to answer more than one question at a time.

Now, I think that is what he is trying to do.

Mr. Trimble: Read the question back, Mr. Pyevac.

The Reporter: (Reading aloud.)

"Q. Now, I don't know what—I don't want to know why you sent it, Mr. Groschelle. My question is—"

A. All right. Counselor, Mr. Mooney suggested that I send the telegram to Judge Park. I sent it to Judge Park and the other persons listed on Exhibit thirteen because I personally thought that it was a responsibility that I have as State Liaison Officer to do what I can to keep the good citizens of the community of Lexington from splitting right down the middle on something that obviously is a controversial issue.

As a result of that any telegram that I might have sent was in totally good faith for that purpose. And not as a response to simply to a request from Mr. Mooney.

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Q. The idea though of sending the telegram was, was Mr. Mooney's, wasn't it, Mr. Groschelle?

A. It had not occurred to me, that it might be something that would offer an opportunity to compromise and I appreciated the suggestion.

Q. And the idea of sending it to Judge James Park was Mr. Mooney's idea originally?

Mr. Sledd: Object to that question.

Mr. Trimble: He can answer it.

Mr. Sledd: For the reason that he has already stated how he happened to send the telegram to Judge Park.

A. The answer to the question is yes.

Q. And the idea of sending the telegram to Judge Swinford was Mr. Mooney's original idea although you concurred in it for the reasons you have stated?

A. Yes, sir.

Q. Now, did Mr. Mooney ever suggest to you or have the idea that a copy of that telegram should be sent to counsel for the Urban Renewal Commission of the City of Lexington?

A. No.

* * * * * * *

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Q. All right, sir. Mr. Groschelle, according to the records of this office, how many places in Kentucky have been registered on the National, National Register as a result of the 1966 Act

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of Congress?

A. One.

Q. And would that one be, I suppose, the so-called Historic District of High Street in Lexington, Kentucky?

A. That is correct.

Q. And that is the only place that has ever been listed by the Commonwealth of Kentucky as a result of the 1966 Act, is that correct, sir?

A. That is correct.

Q. Has the Commonwealth of Kentucky ever proposed to the National Register that any other places ever be listed? Have you submitted any?

A. No.

* * * * * * *

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Q. Mr. Groschelle, you mentioned that in your conversation at the airport in Lexington on July, the night of July 9th, that you were informed that the full Board, full Review Board had voted to recommend the registration of these properties. Is that right, sir?

Mr. Sledd: Object to that question because of its misleading nature and the form of it for the reason that Mr.

Groschelle has previously testified that his concern was whether or not the

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unanimous Board, whether the Board had reacted unanimously.

Mr. Trimble: I will rephrase the question, Mr. Sledd.

Q. You testified that what you were concerned about was that the Board had unanimously recommended that these properties be listed. Is that right, sir?

A. That's right.

Q. And did you make any inquiry of either Mr. Harrison or Mr. Vanderwier, that is whether the Board had acted unanimously?

A. Yes. I asked Mr. Vanderwier and he said to the best of his knowledge. He deferred the last part of the question to Mr. Harrison and the affirmative nod was given and I accepted it at that point as being true facts.

Q. And you have since discovered, have you not, Mr. Groschelle, that Mr. Lawson who is your representative on the Board had in effect left the meeting prior to the vote, had he not?

A. That's right.

Q. Did either Mr. Vanderwier or Mr. Harrison tell you that Mr. Lawson had left the meeting before the vote?

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A. No.

Q. On cross examination by Mr. Sledd you stated that in effect that several historic properties had been, strike that, Steve.

You stated on cross examination by Mr. Sledd that several historic properties were in the process of being nominated for registration. Is that right, sir?

A. That's right.

Q. And in fact, no properties had been mailed or sent to Washington except this High Street property, is that right, sir?

A. That's correct.

Q. It is also true, is it not, Mr. Groschelle, that one of the properties which is in the process of being nominated is the Savage Cave in Adairville, Kentucky?

A. That's right.

Q. It is also true, is it not, that this property is owned by Mrs. Genevieve H. Savage who is in fact a member of the Kentucky Board, isn't that right, sir?

A. (Referring to documents.)

Mr. Sledd: Note the objection of the Plaintiff to this question.

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A. I don't think Mrs. Savage is a member of the Board.

Mr. Sledd: Completely irrelevant and immaterial.

A. That indicates her here on the third page that she was present and counted as a member, but I don't think Mrs. Savage's name was ever submitted to the National Park Service as a member.

Q. Well now, I don't quite understand your testimony. You are telling me she is a member or she is not a member? What is the list that he submitted with that letter of July 2?

(Counsel referring to document.)

Q. Now, referring now, Mr. Groschelle, to the membership roster of the Kentucky Professional Historic Preservation Review Board which is attached to Defendants' Exhibit seventeen—excuse me, Exhibit seven, I will again ask you is not Mrs. Genevieve Savage a member of the Board?

A. (Referring to document.)

Mr. Sledd: Go ahead and answer the question.

A. Mrs. Savage's name was submitted

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to the Board. It was not approved and that is the reason that Doctor Dobyens's name was offered as a substitute.

Q. I would like for you to confer with your staff and tell me what members of the Board were present at the meeting of July 9, 1969?

Mr. Sledd: Note an objection to that question on the basis that the minutes—

Mr. Trimble: For purposes of discovery.

Mr. Sledd: (Continuing)—are the official documents which reflect who was present.

Mr. Trimble: The minutes don't reflect it.

Mr. Sledd: And that it is hearsay, incompetent evidence for the—

Professor Mooney: Not proper discovery.

A. Counselor—

Q. Yes.

A. I am advised by my staff that those members of the Review Board present on the July 8th meeting were present at the time of the vote, were Mrs. Cox, Mr. Wallace, Mr. Floyd, Mr. Bayless and Mrs. Savage substituting for Doctor Dobyens.

Q. What do you mean substituting—

now, it is your testimony, Mr. Groschelle, that present at the meeting of July 8th was Mr. Bayless who had been appointed by you and approved by the National Board, right?

A. (Nodding head in the affirmative.)

Q. Mrs. Cox who had been appointed by you and approved by the National Board?

A. (Nodding head in the affirmative.)

Q. Mr. Wallace who had been appointed by you and approved by the National Board?

A. (Nodding head in the affirmative.)

Q. Mr. Floyd who had been appointed by you and, was absent, is that right, sir?

A. No. Mr. Floyd was present also.

Q. Did you not testify that Mrs. Savage acted for Mr. Floyd?

Mr. Sledd: No, Dobyens.

Q. Excuse me.

A. Mr. Dobyens.

Q. And Mr. Dobyens had been appointed but was absent?

A. Mrs. Savage had been appointed but she was turned down and Doctor Dobyens's name was submitted in place of Mrs. Savage which was approved on July 2nd.

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Q. Mrs. Savage's name had been submitted but disapproved?

A. That's right.

Q. Consequently you appointed Mr. Dobyens?

A. That's right.

Q. Whose name was approved by the National Board.

A. On July 2nd.

Q. Yet Mrs. Savage voted in place of Mr. Dobyens who was absent, is that right, sir?

A. That's what it says there. I wasn't there.

Q. Have you been so advised by members of your staff, to wit Mr. Lawson?

A. I was advised that Mrs. Savage attended in place of Mr. Dobyens.

Q. All right. The minutes, however, reflect that the Board acted unanimously, did it not?

A. Yes, sir.

Q. But Mrs. Savage was not a member of the Board, was she, sir?

A. Nope.

Q. So the members of the Board who

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acted were Mr. Bayless, Mrs. Cox, Mr. Floyd and Mr. Wallace, is that right, sir?

A. Yes, sir.

Q. Mr. Lawson being absent when the vote was taken?

A. That's right, that's right.

Q. And Mr. Dobyens being absent completely?

A. Uh-huh.

Q. At the airport on the night of July 9th, were you informed by either Mr. Harrison or Mr. Vanderwier that Mr. Dobyens had been absent but that Mrs. Savage had voted for him?

A. No, I was not advised as such.

* * * * * * *

APPENDIX "L"

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON, KENTUCKY

No. 2080

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., ETC., and
CURTISS HARRISON, ET AL., - - - - *Plaintiffs,*

v.

GEORGE ROMNEY, ET AL., - - - - - *Defendants.*

DEPOSITION OF DR. WILLIAM J. MURTAGH.

Deponent: Dr. William J. Murtagh.

Date: October 30, 1969.

Stephen R. Pyevac, Reporter.

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The deposition of DR. WILLIAM J. MURTAGH, taken as evidence on behalf of the Defendants, pursuant to notice and Subpoena Duces Tecum heretofore filed, in Room 6443, Department of Interior, Washington, D. C., on October 30, 1969 at 1:30 P. M., and to be used in accordance with the Federal Rules of Civil Procedure.

Appearances.

For the Plaintiffs — Mr. Roger B. Sledd, Lexington, Kentucky.

For the Defendants: Mr. C. Thomas Greene, Lexington, Kentucky.

DOCTOR WILLIAM J. MURTAGH, called on behalf of the Plaintiffs (sic) and, after being first duly sworn, was examined and testified as follows:

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Direct Examination by Mr. Greene.

Q. Just for the record, Doctor, would you state your name and address, please?

A. My name is William J. Murtagh, you want the home or office?

Q. Just office address.

A. 801 19th Street, Northwest, Room 618, Washington, D. C.

Q. And you hold a Doctor's degree in what, sir?

A. History of Arts and Architect, University of Pennsylvania.

Q. And where are you employed, and in what capacity?

A. I am employed in the National Park Service of the Department of Interior as Keeper of the National Register.

Q. And to what Register do you have reference?

A. The National Register of Historic Places.

* * * * * * * *

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Q. Now, of the seven people listed in that document for nomination as members of the Historical Preservation Review Board, how many were accepted?

A. Six.

Q. And who was not accepted, please, sir?

A. Mrs. Genevieve Savage, Archaeologist.

Q. And what was the reason for her not being accepted?

A. Not sufficiently professionally qualified.

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Q. Did the State subsequently thereto submit someone to replace Mrs. Savage who was not accepted?

A. Yes.

Q. And who was that, please?

A. Henry F. Dobyens.

* * * * * * *

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Q. I believe you have testified that Kentucky has to date made one nomination of properties for inclusion in the National Register under the 1966 Act. Is that correct?

A. Correct.

Q. And what are those properties?

A. The West High Street Historic District in Lexington, Kentucky.

Q. And that district consists of what?

A. (Referring to document) The north side of the one hundred, two hundred and three hundred blocks of West High Street in Lexington.

Q. Now, are these nominations made in writing?

A. They are made on forms submitted

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to the States, to the State Liaison Officer.

Q. And then the forms are filled out at the State level and submitted to the—

A. Yes.

Q. National Registry?

A. Yes.

Q. And when was Kentucky's form submitted, do you know?

A. This was received in our office on July 10, 1969.

* * * * * * *

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Q. Now, Doctor, is it correct that this nomination was submitted under the procedures contemplated by Section 2.9 of the Grants Manual as an advanced nomination?

A. Yes, sir.

Q. And Doctor, is it further correct that Section 2.9 of the Grants Manual requires the unanimous approval of the

Professional Review Committee and the State Liaison Officer to the properties being nominated being unquestionably worthy of entry in the National Register?

A. Yes.

Q. Doctor, prior to the receipt of the nomination for these buildings which was delivered to you by Mr. Harrison on the 10th of July, has there been any discussion between yourself or any members of your staff with any members of the Review Board or the State Liaison Officer or his agent or employee concerning these properties?

A. Yes, sir.

Q. And would you tell us what, was that communication to you?

A. Yes.

Q. Who communicated with you concerning that?

A. Mr. Harrison.

Mr. Sledd: Excuse me now, he is not being responsive to the question—yes, he is, all right.

Q. And when was that communication, sir?

A. Well, I can't tell you exactly. It was by telephone saying that there was an intent to make that submission. But I don't remember the exact date.

Q. And if you recall, approximately how long before the submission was made was this telephone call made?

A. I would hesitate to say. I honestly don't remember.

Q. Was it a matter of weeks or a matter of months or matter of days?

A. No, it would be a matter of weeks certainly.

Q. And did Mr. Harrison in that telephone conversation inform you that there was a necessity and desire that these properties be rushed through, so to speak, and approved as quickly as possible?

Mr. Sledd: Note an objection of

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counsel for the Defendants (sic) as to this question for the reason that it is irrelevant, incompetent, and immaterial as to the issues in this litigation.

Mr. Greene: You may answer.

Mr. Sledd: And I instruct the witness not to answer the question.

Mr. Greene: You may answer.

Mr. Sledd: I ask that the question be certified to the Court to determine if it is proper grounds for discovery.

Mr. Greene: Well, Mr. Sledd is aware that the doctor is a witness, not a party to this action and he cannot be instructed not to answer the question. As to the admissibility of the question, it can be taken up with the Court at the proper time.

You may answer the question.

Mr. Sledd: I may advise the witness that he can require the question be certified to the Court as to whether or not he does have to answer.

Mr. Greene: Well, I am going to object to Mr. Sledd instructing him or advising the witness since he is here as counsel for the Plaintiffs and not as counsel for the witness. You may answer the question.

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A. Mr. Harrison indicated that there was an Urban Renewal program in the area. Upon questioning on my part I was assured that no contractual agreements had been entered into.

Q. Did he indicate that this was the reason that the documents would be hand delivered, and that there was some urgency in having them appear on the Register?

A. Yes, I guess so. I would have to answer yes to that.

* * * * * * *

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Q. Now, Doctor, I want to pose to you a hypothetical

question. Will you assume that a State has nominated and has accepted a State Liaison Officer;

Will you assume further that the State

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had submitted for acceptance a State Advisory Board of seven members;

Will you assume further that the office of History and Archaeology had rejected one of those members, let's call her Mrs. Savage;

Will you assume further that the State submitted a replacement nominee for Mrs. Savage and let us call him Doctor Dobyons and that this replacement formally was accepted thereby giving the State a State Advisory Committee composed of seven members which have been approved and accepted by the proper Federal authorities;

Will you assume further that the State has not submitted a survey or a plan as contemplated in the Act;

Will you assume further that the State Advisory Board calls a meeting at which six persons were present, five of the persons present having been accepted by the Federal Agency and the sixth person present being Mrs. Savage who is not accepted but who purports to act for one of the accepted members who is absent;

Will you assume further that at this meeting a discussion is held to consider the nomination of certain properties for inclusion in the National

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Register;

Will you assume further that during the course of the discussion one of the members present excused himself indicating that he will not return to the meeting leaving five people present, four accepted members and Mrs. Savage;

Will you assume further that after this person has excused himself and while there are the five persons present

a vote is taken on the submission of the properties being considered and that persons present all voting including Mrs. Savage to determine to submit these properties for consideration.

Now, Doctor, on the basis of these assumptions, for this hypothetical question in your opinion as the Keeper of the National Register, would the action of this meeting satisfy the requirements of the Office of History and Archaeology, particularly of the Office of Archaeology and Historic Preservation for the inclusion of the properties in the National Register?

Mr. Sledd: Now, I—

Mr. Greene: Wait a minute.

Q. (Continuing) —prior to the submission of a plan and survey?

* * * * * * *

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A. No.

* * * * * * *

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Q. Continuing with the same assump-

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tions, let us assume that these facts later became known to the Office of Archaeology and Historic Preservation, would the Office of Archaeology and Historic Preservation and would yourself after you learned of these facts take any steps to have the properties listed on the National Register whether they be one building or several removed from the National Register until proper compliance had been made?

* * * * * * *

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A. We would first of all apprize the State of this infraction of the Grants Guide and request the State to comply with the Section that had not been complied with and trusting that the State would take means to rectify this.

If the State did not take means ultimately to rectify I see where we would have no alternative but to remove it from the Registry.

* * * * * * *

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No. 1210

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SOUTH HILL NEIGHBORHOOD ASSOCIATION INC., ET AL.,
Petitioners,

v.

GEORGE ROMNEY, Secretary of Housing and Urban Development, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF PETITION FOR CERTIORARI

WILLIAM STANLEY, JR.
Attorney for Amicus Curiae
National Trust for
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March 20, 1970

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SOUTH HILL NEIGHBORHOOD ASSOCIATION INC., ET AL.,
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GEORGE ROMNEY, Secretary of Housing and Urban Development, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF PETITION FOR CERTIORARI

This brief *amicus curiae* is submitted by the National Trust for Historic Preservation in the United States ("National Trust").[1] The National Trust is the leading national organization in the field of historic preservation. It was chartered by Congress in 1949 as a "charitable, educational and non-profit" corporation

[1] Although the petitioners and the Solicitor General have consented to the filing of this brief, certain respondents have not; a motion for leave to file this brief *amicus curiae* is therefore attached as an Annex. Since the Attorney General is by statute a member of the Board of Trustees of the National Trust (16 U.S.C. § 486b), he did not participate in the Trust's decision to file this brief.

"to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest," and to preserve and administer historical properties significant in american history and culture for the public benefit. 63 Stat. 927, 16 U.S.C. § 468. Today the National Trust has approximately 20,000 contributing members, including hundreds of national, state and local organizations dedicated to historic preservation. In addition to owning and maintaining important historic properties, the National Trust furthers the cause of historic preservation through extensive advisory and educational services.

The National Trust supports the petition for certiorari in this case because the decisions below represent a severe threat to the cause of historic preservation in the United States. Directly at issue is the National Historic Preservation Act of 1966, 80 Stat. 915, 16 U.S.C. § 470. The Act, which was passed with the support and encouragement of the National Trust, reflects serious and mounting congressional concern to protect and preserve historic sites and buildings.[2] The preamble to the Act declares that "the historic and cultural foundations of the nation should be preserved as a living part of our community life and development." While stressing that private agencies have and should continue to play a vital role in historic preservation

[2] Previous legislation in support of historic preservation includes the National Monument Act of 1906, 34 Stat. 225, 16 U.S.C. §§ 431-433; the Historic Sites Act of 1935, 49 Stat. 666, 16 U.S.C. §§ 461-467; the act creating the National Trust, Act of Oct. 26, 1949, Pub. L. No. 81-408, 63 Stat. 927, 16 U.S.C. § 468; and provisions in the Housing and Urban Development Act of 1965, 79 Stat. 477, authorizing federal assistance for relocation of historic properties in urban renewal areas. Title VI of the Demonstration Cities and Metropolitan Development Act of 1966, 80 Stat. 1278, authorizes federal assistance for historic preservation in connection with urban renewal.

efforts, the Act states that present governmental historic preservation programs and activities are inadequate to protect historic properties against "ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments."

The Act establishes a National Register of historic properties and an Advisory Council on Historic Preservation, and authorizes federal matching grants-in-aid for historic preservation projects. In order to protect historic properties from destruction by other federal or federally assisted activities, Section 106 of the Act, 16 U.S.C. § 470f, provides that:

> "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking."

The courts below held that concerned historic preservation organizations and the owners of historic properties listed on the National Register lack standing to complain of violations of Section 106 by federal officials that threaten destruction of such properties. Since these groups are the only ones likely to complain of such violations, this ruling effectively renders Section 106 unenforceable. The courts further held that Section 106 does not protect historic properties threatened by federally assisted projects unless the prop-

erties have been listed on the National Register before the initial plan for a project or a formal amendment thereto is approved by federal officials. This holding greatly increases the vulnerability of historic properties to destruction by federally funded activities.

ISSUES PRESENTED

Section 106 of the National Historic Preservation Act of 1966 provides that the head of any federal agency with jurisdiction over federal or federally assisted undertakings shall take into account the effect of the undertaking on any historic property listed on the National Register prior to approving the expenditure of federal funds on the undertaking, and shall also afford the Advisory Council on Historic Preservation a reasonable opportunity to comment.

The questions presented are:

1. Whether historic preservation organizations with a demonstrated special interest in historic properties listed on the National Register and owners of such properties lack standing to complain of violations of Section 106 that threaten destruction of such properties.

2. Whether Section 106 should be construed in a manner that will substantially deprive historic properties listed on the National Register of protection from destruction by urban renewal projects and other federally assisted activities.

STATEMENT OF THE CASE

This controversy directly involves the fate of 14 historic buildings located on the 100, 200, and 300 blocks of West High Street in Lexington, Kentucky. These buildings, which have long been recognized as historic properties because of their age, architecture, and his-

tory, were listed on the National Register for historic properties on July 10, 1969. Notice of this listing was published in the Federal Register on August 5, 1969, 34 Fed. Reg. 12722 (daily ed.). Seven of the buildings have already been demolished by a federally assisted urban renewal project of the Lexington Urban Renewal and Community Development Agency ("Renewal Agency"). The remaining seven buildings are threatened with destruction by the project.[3]

This project was initially approved by the Department of Housing and Urban Development ("HUD") under a Loan and Capital Grant Contract on June 7, 1966. As initially approved, the plan provided that all improvements in the project area, including the 14 historic buildings involved here, would be cleared and the entire project area would be used for commercial purposes. On October 18, 1968, HUD approved a formal amendment to the project plan which authorized an alternative use of historic preservation for the 200 block of West High Street, encompassing seven of the historic buildings. The alternative use of historic preservation was conditioned upon submission of an acceptable plan to restore and maintain the seven buildings. A second formal amendment to the project plan, relating largely to the alignment of streets, was approved by HUD on March 8, 1969.

The Renewal Agency advertised for bids to purchase a part of the renewal tract that included the seven historic buildings on the 200 block of West High Street.

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[3] Originally, three of the buildings were located on the 100 block of West High Street, seven on the 200 block, and four on the 300 block. There now remain three buildings on the 100 block, one on the 200 block, and three on the 300 block. The renewal plan calls for destruction of the remaining buildings.

Two bids were submitted and opened by the Renewal Agency on July 10, 1969, the same day that all 14 of the historic buildings were listed on the National Register. One bid, submitted by a bank, called for destruction of the seven historic buildings and erection of an office building. The other bid, submitted by a local historic preservation organization, Historic Lexington, Inc., called for restoration and preservation of the seven historic buildings.

On July 18, 1969, the Renewal Agency accepted the bank's bid. It rejected the historic preservation bid on the alleged ground that it did not comply with the Agency's bidding specifications. HUD approved the Renewal Agency's acceptance of the bank's bid on July 29, 1969. On October 14, 1969, HUD approved the Renewal Agency's selection of a contractor to demolish the seven historic buildings on the 200 block of West High Street in order to clear the land for disposition to the bank. Demolition was begun the same day.

Plaintiffs immediately commenced an action in the state courts against the bank, the demolition contractor, and local officials to restrain destruction of the buildings. The state court action was eventually dismissed for failure to state a claim under state law.

This action was commenced in the United States District Court for the Eastern District of Kentucky on October 17, 1969. Plaintiffs include South Hill Neighborhood Association, Inc., an organization dedicated to historic preservation and composed of citizens living near the renewal area; the Blue Grass Trust for Historic Preservation, Inc., a local historic preservation organization that is a member of the National

Trust; and individuals who own two of the remaining seven historic buildings, located on the 300 block of West High Street.[4] Defendants include the Secretary of Housing and Urban Development and the Lexington Renewal Agency and its members. Relying in part on asserted violations of Section 106 of the National Historic Preservation Act of 1966, the action sought to restrain destruction of the 14 historic buildings.

The action was dismissed without trial by the District Court, which held that plaintiffs did not have standing to complain of violations of Section 106. The court further stated that even if plaintiffs had standing, the action would still be dismissed because the National Register listing of the properties occurred after HUD had approved the initial project plan and formal amendments to the plan, and Section 106 was therefore inapplicable. Summarily affirming, the Court of Appeals stated that the grounds relied upon by plaintiffs were insubstantial.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted because the holding below that plaintiffs lack standing to complain of violations of Section 106 of the Act is squarely contrary to the broadened law of standing recently approved by this Court in *Association of Data Processing Services Organizations, Inc.* v. *Camp,* 38 U.S.L.W. 4193 (U.S. March 3, 1970), and *Barlow* v. *Collins,* 38 U.S. L.W. 4195 (U.S. March 3, 1970), and contrary to Congress' express intent that private organizations and

[4] All of these plaintiffs except the Blue Grass Trust are petitioners here.

individuals should play a central role in the federal program for historic preservation.

Data Processing held that one has standing to challenge agency action as unlawful if the interest he represents is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" and the agency action adversely affects those interests. 38 U.S.L.W. at 4194. A person meeting this test is "aggrieved by agency action within the meaning of a relevant statute" and therefore has standing under the Administrative Procedure Act, 5 U.S.C. § 702. Although *Data Processing* upheld the standing of competitors based on their economic interest, the Court stressed that standing may be based on interests that reflect "'*aesthetic, conservational,* and *recreational*' as well as economic values." It stated that "We mention these *non-economic values* to emphasize that *standing may stem from them* as well as from . . . economic injury . . . ." *Ibid.* (emphasis supplied)

In *Barlow*, the Court invoked the *Data Processing* "zone of interests" test to hold that tenant farmers affected by a federal agricultural assistance program had standing to complain that the program was being administered contrary to the governing statute. *Barlow* and *Data Processing* represent a logical culmination of previous decisions of this Court and of courts of appeals, which had already established that intended beneficiaries of a federal statute have standing to challenge departures by federal administrative officials from statutory requirements. *See King* v. *Smith*, 392 U.S. 309 (1968); *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968); *Peoples* v. *Department of Agriculture*, —— F.2d —— (D.C. Cir. No. 22,574, February

3, 1970); *Curran* v. *Laird*, —— F.2d —— (D.C. Cir. No. 21,040, November 12, 1969); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).

This broadening law of standing was ignored by the courts below in denying standing to two local historic preservation organizations. Such organizations fall within the "zone of interests" that the National Historic Preservation Act was designed to protect and therefore have standing to complain of violations of the Act by federal officials.

The obvious and basic purpose of the Act is to protect interests which historic preservation organizations represent. Moreover, the Act explicitly asserts that private historic preservation agencies "should continue to play a vital role" in historic preservation and expresses a purpose to "give maximum encouragement to agencies and individuals undertaking preservation by private means." Under the financial aid provisions of the Act federal funds are available for historic preservation projects by private organizations. The legislative history of the Act confirms Congress' recognition of the important role to be played by private historic preservation organizations in carrying out the purposes and provisions of the Act.[5] The stand-

[5] The committee reports and the floor debates repeatedly emphasize the role of historic preservation groups in implementing the Act's purposes. S. Rep. No. 1363, 89th Cong., 2d Sess. 6, 8-9 (1966); H. Rep. No. 1916, 89th Cong., 2d Sess. 5, 8 (1966); 112 Cong. Rec. 15167, 22956-7, 25938-8 (1966). The letter from the Secretary of Interior transmitting the bill that was eventually enacted stressed the need "to encourage on an accelerated basis the local initiative and support that is needed for preservation of our historic heritage." S. Rep. No. 1363, 89th Cong., 2d Sess. 13 (1966).

ing of historic preservation organizations is thus "[i]mplicit in the statutory provisions and their legislative history." *Barlow* v. *Collins, supra* at 4197.

The standing of historic preservation organizations under the "zone of interests" test is reinforced by sound policy considerations. Unless such organizations are afforded standing, Section 106 would in many instances be rendered unenforceable as a practical matter; other groups or individuals will often lack sufficient interest in historic preservation to challenge violations of the Act in the courts.[6] The situation here is thus analogous to cases where standing has been granted to interested citizens' organizations to vindicate the public interest in ensuring that administrative officials conform to congressional requirements. *See Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965).

The only concrete explanation advanced by the District Court for denying standing to the plaintiff historic preservation organizations was that they had not submitted a formal purchase bid on the seven historic properties on the 200 block of West High Street. But

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[6] Normally, the only other interested class of persons are the owners of the historic properties involved. The owners may often be indifferent to the fate of the properties once they have been condemned and compensation has been paid. Owners of only two out of the fourteen threatened properties participated in this action, whose primary impetus came from local historic preservation organizations and their members. Moreover, as we discuss subsequently, the courts below held that owners of historic properties also lack standing to complain of violations of Section 106.

one historic preservation organization did submit such a bid, and the plaintiff organizations participated in consultations and other efforts to persuade the Renewal Agency and HUD to accept the historic preservation proposal. The plaintiff organizations have also been active at both local and national administrative levels in efforts to save the other seven historic properties involved; the Renewal Agency has from the beginning ruled out any historic preservation proposals for them. In these circumstances, the District Court's requirement of a formal purchase bid as a prerequisite for standing constitutes a wholly artificial and unauthorized limitation of the "zone of interests" test established by *Data Processing*. The plaintiff organizations have demonstrated a sufficiently direct and concrete interest in this controversy to entitle them to standing.

In addition to denying standing to the plaintiff historic preservation organizations, the courts below held that the plaintiffs who own two of the threatened historic buildings listed on the National Register were without standing to protest violation of Section 106 of the Act. This ruling is also contrary to the law of standing approved in *Data Processing* and *Barlow*, for the owners of historic buildings are obviously within the "zone of interests" protected by an act that has as its purpose the preservation of such buildings.

The rulings below on standing effectively render Section 106 a dead letter. Local renewal agencies will in most instances strongly prefer profitable commercial reuse of land over historic preservation and, as this controversy demonstrates, federal administrators are not disposed on their own initiative to question such

preferences.[7] Historic preservation organizations and the owners of historic properties are the only groups likely to complain and to enforce compliance with Section 106. Unless such groups are afforded standing, the more than 1,600 historic properties now listed on the National Register and numerous additional properties expected to be listed in the future will be effectively deprived of congressionally imposed safeguards against destruction by urban renewal projects and by other federal or federally supported activities such as highway construction, public housing, and governmental and military installations. The issues involved are of far reaching significance and merit review by this Court.

II.

Certiorari should be granted because this case presents to the Court for the first time an important question concerning the operative scope of the National Historic Preservation Act of 1966. The courts below construed the Act in a manner that defeats its basic purposes and deprives historic properties of protection against heedless destruction.

At issue is the requirement in Section 106 of the Act that federal officials shall, "prior to the approval of the expenditure of any Federal funds" on a federal

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[7] HUD approved (although it did not initiate) an amendment to the project plan that would permit historic preservation as an alternative to commercial reuse for the properties on the 200 block of West High Street. But when the Renewal Agency rejected the historic preservation alternative and approved commercial reuse, HUD simply rubber-stamped the Renewal Agency's action without any apparent consideration of the fact that it would cause destruction of historic properties listed on the National Register or inquiry whether the alleged ground for the rejection—failure to comply with bidding requirements—was well founded.

or federally assisted undertaking, consider the effect of the undertaking on historic properties listed on the National Register. The courts below held that Section 106 applies only when HUD initially approves a renewal plan under a Loan and Grant Contract or approves a formal amendment to such a plan; if an historic property is thereafter listed on the National Register, HUD is not required to give any consideration to the fact that it will be destroyed by a renewal project. This narrow construction of the Act is not required by the statutory language, is wholly inconsistent with the Act's purposes, and is not supported by considerations of policy.

While the controlling statutory language *can* be read as limiting a government agency's duty to consider historic preservation to instances where it formally makes an initial or amended commitment to assist a project, it may be read also to impose such a duty when the agency exercises ongoing control over steps in a project's execution that threaten historic properties. Any significant step in executing a federally assisted project involves "expenditure of . . . Federal funds." By the same token, approval by a federal agency of any such step constitutes "approval of the expenditure of . . . Federal funds." On this view, HUD's approval in this case of the Renewal Agency's federally subsidized sale of land to the bank in place of historic preservation, and its approval of a federally subsidized contract for demolition of historic buildings represent "approval of the expenditure of . . . Federal funds" which threaten historic properties and thus call into play the requirements of Section 106.

The broader construction of the Act is supported by the fact that HUD's authority over federally assisted

urban renewal projects is by no means limited to passing upon Loan and Grant Contracts or amendments thereto. Planning and execution of such projects are governed by the Urban Renewal Handbook, a comprehensive body of HUD regulations running to many hundreds of pages. The regulations provide for detailed HUD scrutiny and control of every step of a project, including disposition of land to bidders and selection of contractors. See RHA 7209.1 Ch. 4 § 3 p. 2. In order to secure the Act's basic purpose of protecting historic properties, it should be construed to impose on HUD and other agencies a responsibility to consider a project's effect on historic properties that is coextensive with their authority over the project. This interpretation of the statute is also supported by the legislative history,[8] and by HUD's own regulations.[9]

[8] While not addressing itself to the precise issue presented here, the legislative history does stress Section 106's basic purpose to preserve historic properties. This purpose militates against the construction of the statute embraced by the courts below and in favor of the interpretation urged by petitioners. Also, Senator Jackson, the Chairman of the Senate Interior Committee, indicated that federal agencies must comply with Section 106 whenever a property listed on the National Register is threatened, regardless of when the listing occurs: "My point is, if you had a Federal register of such historical buildings and sites, then it would seem to me that the head of the agency would be on notice, and he would have to follow a certain procedure. Where such sites and historical buildings have been identified, a proposal for change of status should be submitted to the advisory group." Preservation of Historic Properties, Hearing before the Subcommittee on Parks and Recreation of the Senate Committee on Interior and Insular Affairs 26 (1966) [hereafter Senate Hearing].

[9] RHA 7207.1 Ch. 2 p. 4-3 provides that "No property in the project area that is listed on the National Register shall be removed, demolished or substantially altered by the [local agency] . . . without the prior concurrence of HUD. All such actions must

The refusal of the courts below to give effect to the statutory purpose will as a practical matter drastically curtail the protection afforded by the Act to historic properties and greatly increase their vulnerability to destruction. Its implications reach far beyond this case. Approximately 1,000 of the urban renewal projects in the nation (about half of the total number of such projects) were initially approved by HUD prior to the 1966 passage of the Act, which authorized the National Register. Under the decisions below, historic properties since listed on the National Register will enjoy virtually no protection against destruction by such projects.[10]

Moreover, the listing of historic properties on the National Register since 1966 has been a slow, careful process that will continue for a considerable time in the future. This fact, coupled with the long gestation period between initial approval and completion of urban renewal projects, exposes a high proportion of properties now listed or to be listed on the National Register to destruction by hundreds of other urban renewal projects initially approved prior to listing of

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be fully justified in the Part I Loan and Grant Application or in subsequent project amendatories, as appropriate." This regulation apparently requires a local renewal agency to file a project amendment to secure HUD approval before destroying a property listed on the National Register after initial approval of a project.

[10] Although the decision below would apparently require HUD to take into account the adverse effect on historic properties when approving formal amendments to a Loan and Grant Contract as well as when it initially approves a Contract, the requirement with respect to amendments would be of little practical significance. Initial renewal plans have generally not provided for any historic preservation; hence, amendments would generally have no additional adverse effect on historic properties.

such properties on the Register. This exposure of historic properties to destruction by urban renewal projects is a matter of grave concern because, as the Director of the National Park Service testified at the hearings on the Act, "the more critical issues in historic preservation face us today in our older cities, where, in the process of modernization and renewal, historic properties are theatened." [11]

Furthermore, the gap in protection decreed by the courts below is not limited to urban renewal projects. Historic properties are left open to destruction by other types of federal or federally assisted projects whenever the project is initially approved prior to the historic property's listing on the National Register. As the extent of federal assistance for highway construction, housing, and other activities grows, this gap in protection will become increasingly serious.

No considerations of public policy justify such emasculation of the Act and its historic preservation purposes. The sole claim advanced by the District Court to support its narrow interpretation of Section 106 was that "[a]ny other construction of the statute would place too great a burden on the urban renewal administrative process." This claim is without merit. Section 106 imposes a procedural requirement that federal agencies "take into account" the effect of federally assisted activities on historic properties listed on the National Register and afford the Advisory Coun-

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[11] Senate Hearing p. 15. The Director, Mr. Hartzog, also stated that "I think we have lost a great deal of the historic heritage of our Nation in the Urban renewal programs, and the Bureau of Public Roads program which have not been geared and oriented towards this facet of our heritage." *Ibid.*

cil on Historic Preservation a reasonable opportunity to comment. This procedural requirement involves only a minor burden on administrative officials, and does not demand unwarranted disruptions in executing federally financed projects.

The fact that a property had been listed on the National Register only after a project had been substantially completed could certainly be a factor that a government agency could consider in determining what provision, if any, should be made for the property. Similar considerations would bear on the propriety of injunctive relief for alleged violations of Section 106. National Register listing of an affected property may not always justify changes in a project that is already underway. But this possibility does not warrant a rule that relieves federal officials of any obligation even to consider the effect of a project's execution on historic properties.[12]

Congress conceived the Act as a great forward step in protecting historic properties. The construction of the Act embraced by the courts below defeats Congress' purpose and is wholly without justification. The ques-

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[12] The danger of disruptions in settled plans may be more illusory than real. If Section 106 were construed to protect properties listed after initial approval of a project, those responsible for the project would probably seek to deal with affected historic properties from the outset, before they had received National Register listing. In this case the Renewal Agency was notified of the historic importance of the properties involved as early as 1966. Aid is available to local renewal agencies for historic preservation even though the properties involved have not been listed on the National Register. See Title VI of the Demonstration Cities and Metropolitan Development Act of 1966, 80 Stat. 1278.

tion presented is one of first impression, has broad importance, and deserves review by this Court.

III.

Certiorari should be granted because action must be taken now to prevent further destruction of historic properties in the United States.

Our historic buildings and places constitute an irreplaceable national treasure that is being systematically destroyed by urban renewal, highway construction, and other federally financed instruments of demolition and dislocation. Congress enacted Section 106 of the Act for the express purpose of preventing such heedless destruction.

The decisions below severely restrict the scope of the Act and render it unenforceable for practical purposes. So long as these decisions are permitted to stand, federally assisted destruction of historic properties will continue virtually unabated. Moreover, the decisions below will have a chilling effect on the willingness of those concerned with historic preservation to litigate the issues involved anew. It may thus be some time before other federal courts will have an opportunity to consider the soundness of the rulings below, and further time would elapse before this Court would have an opportunity to resolve the issues if it awaits the development of a conflict between courts of appeals before acting. In the interim there would be irretrievable destruction of important historic landmarks. The Court should grant certiorari to prevent further irreparable injury to our national heritage.

CONCLUSION

For the reasons stated in this brief and in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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March 20, 1970

ANNEX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1210

SOUTH HILL NEIGHBORHOOD ASSOCIATION INC., ET AL., *Petitioners*,

v.

GEORGE ROMNEY, Secretary of Housing and Urban Development, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Trust for Historic Preservation in the United States, by its undersigned attorney, hereby respectfully moves the Court, pursuant to its Rule 42(3), for leave to file the attached brief *amicus curiae* in this case. The petitioners and the Solicitor General have consented to the filing of such brief, but certain respondents have not.

The National Trust for Historic Preservation in the United States ("National Trust") is the leading national organization in the field of historic preservation. Chartered by Congress in 1949 to preserve and administer historical properties and to advance the cause of historic preservation in the United States (63 Stat. 927, 16 U.S.C. § 468), the National Trust today has approximately 20,000 contributing members, including hundreds of national, state and local organizations dedicated to historic preservation. In addition to owning and maintaining important historic properties, the National Trust furthers the cause of historic preservation through extensive advisory and educational services.

This case raises two critical questions, the resolution of which will have a major impact upon Congress' long-established and mounting concern to protect and preserve properties of significant historic value. As noted in the attached brief, these questions concern the standing of private organizations and individuals interested in historic preservation to challenge violations by federal officials of a congressional statute designed to protect historic properties; and the scope of protection afforded historic properties by the National Historic Preservation Act of 1966 against destruction by urban renewal projects and other federally assisted projects. These issues have profound importance for historic preservation programs throughout the country. As the leading national organization in the field of historic preservation, the National Trust submits that it is especially well qualified to bring the far-reaching implications of this case to the Court's attention.

For the foregoing reasons, the National Trust respectfully prays the Court to grant it leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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March 20, 1970

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No. 1210

In the Supreme Court of the United States

OCTOBER TERM, 1969

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., ET AL., PETITIONERS

v.

GEORGE ROMNEY, SECRETARY OF UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT SECRETARY OF HOUSING AND URBAN DEVELOPMENT IN OPPOSITION

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the district court (Pet. App. A-47-60) is not reported. The opinion of the court of appeals (Pet. App. A-61-64) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1969. The petition for a writ of certiorari was filed on February 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 106 of the National Historic Preservation Act of 1966 provides that the head of any federal agency having jurisdiction over a federally-assisted undertaking must "prior to the approval of the expenditure of any Federal funds on the undertaking * * * take into account the effect of the undertaking on any" building listed on the National Register of Historic Places and give the Advisory Council on Historic Preservation (which administers the Register) the opportunity to comment thereon. The questions presented are:

1. Whether private associations and individuals concerned with historical preservation but who do not own buildings affected by a federally-assisted undertaking have sufficient legal interests to permit them to enjoin alleged violations of Section 106.

2. Whether the Secretary of Housing and Urban Development must follow the requirements of Section 106 in connection with the impending demolition of historic buildings listed on the National Register when the expenditure of federal funds on an urban renewal plan involving the destruction of these buildings was approved by the Secretary prior to the listing of such buildings on the Register.

STATUTE INVOLVED

Section 106 of the National Historic Preservation Act, 16 U.S.C. (Supp. IV) 470(f), provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i-470m of this title a reasonable opportunity to comment with regard to such undertaking.

STATEMENT

Petitioners brought this action against respondent George Romney, Secretary of Housing and Urban Development ("HUD"), respondent Lexington (Kentucky) Urban Renewal Agency, and certain other respondents, to enjoin the destruction of seven buildings in the carrying out of an urban renewal plan for downtown Lexington. The gravamen of petitioners' complaint is that HUD failed to consider the effect of the plan upon the buildings and to notify the Advisory Council on Historic Preservation of the proposed demolition. The buildings were part of the "West High Street Historic District," which was placed on the National Register of Historic Places on July 10, 1969, pursuant to the National Historic Preservation Act of 1966 (Pet. App. A-27-43). That was approximately two months

after HUD finally approved the amended urban renewal plan.

Petitioners South Hill Neighborhood Association and Bluegrass Trust for Historic Preservation have as a common purpose the preservation of historic buildings in Kentucky (Pet. App. A-48). Neither owns or has ever owned any property in the area of controversy (*ibid.*). Petitioner Curtis Harrison is president of South Hill Neighborhood Association, a citizen and a taxpayer but not a resident or owner of any of the buildings on the Register (*ibid.*). Petitioners Stathis Kafoglis and W. T. Dennis and his wife are citizens and taxpayers and owners of property within the area in controversy (*ibid.*). The district court found that none of the petitioners owned or have owned any of the seven buildings when they were placed on the National Register (Pet. App. A-56).

In July, 1965, pursuant to due notice given each property owner within the area in controversy (including petitioners Kafoglis and Dennis), urban renewal plan Ky. R-63 was approved by Kentucky officials (Pet. App. A-49). This plan provided that all land acquired within the project area would be cleared of all improvements (including the seven buildings) and thereafter would be used for commercial purposes (*ibid.*). This plan was submitted to HUD, which, on June 7, 1966, approved it and authorized federal funding for the project (*ibid.*).

Shortly thereafter, the plan was amended to permit, *inter alia*, an alternative use of historic preservation for the block in which the seven buildings

were located (Pet. App. A-49-50). This plan provided that these buildings would be allowed to remain if they would be restored in conformity with standards of rehabilitation established by the Lexington Urban Renewal Agency; but that if the buildings were not restored, they would be demolished (Pet. App. A-50). HUD approved the amended plan on October 18, 1968 (*ibid.*). The district court found that none of the petitioners submitted a plan for restoration of the buildings (Pet. App. A-58).

In January 1969, the plan was again amended in minor respects not pertinent here. These amendments retained the alternate use for historic preservation for the buildings (Pet. App. A-50). HUD approved the second amendment in May 1969 (*ibid.*).[1]

The fourteen buildings comprising the West High Street Historic District (which included the seven buildings involved here) were placed on the Register on July 10, 1969 (Pet. App. A-58). By that time, the Lexington Urban Renewal Agency had acquired title to all those buildings (note 1, *supra*).

No plan of restoration acceptable to local authorities was submitted. The Lexington Urban Renewal Agency accepted a proposal for construction of commercial buildings in the area in controversy and entered into a contract with the successful bidder which contemplated, among other things, demolition of the seven buildings (Pet. App. A-51).

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[1] In February 1969, the Lexington Urban Agency had acquired title to the buildings (Pet. App. A-32).

On October 15, 1969, with the approval of HUD, demolition was begun on the seven buildings, as a result of which one was totally destroyed and two others damaged (Pet. App. A-51). Petitioners brought a State court action to enjoin the project, and the court issued a temporary restraining order against further demolition (Pet. App. A-4), which it dissolved upon determining that petitioners had failed to state a claim on which relief could be granted under Kentucky law (Pet. App. A-5-9).

Petitioners then brought the instant action in the federal district court, seeking injunctive and declaratory relief. They alleged that HUD had violated Section 106 of the National Historic Preservation Act by failing to consider the effect of the plan upon the buildings and by failing to notify the Advisory Council on Historic Preservation of the proposed demolition. The district court dismissed the complaint, ruling both that petitioners lacked standing to maintain the action and that HUD's actions did not violate Section 106.

The court held that petitioners lacked standing as taxpayers because their allegations had "established neither a logical link between their taxpayer status and the type of legislative enactment attacked nor a nexus between their taxpayer status and the precise nature of the constitutional infringement alleged"; and that since none of them had ever held title to any of the seven buildings, none had "any real interest in this litigation" (Pet. App. A-56). On the merits, the court noted that HUD's initial approval of urban renewal plan Ky. R-63 and its subsequent

approval of later amendments all occurred before any of the buildings had been placed on the National Register (Pet. App. A-59). The court concluded that Section 106 "and the duty contained therein refers only to times when plans or amendments to plans are authorized and resulting loan and capital grant contracts are entered between HUD and local urban renewal agencies" and not to every subsequent step in the carrying out of previously-approved urban renewal plans (*ibid.*).

The court of appeals affirmed, primarily on the basis of the district court's opinion (Pet. App. A-64).

ARGUMENT

Although the test of standing that the district court applied here was more restricted than that subsequently announced by this Court in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, No. 85, O. T., 1969, decided March 3, 1970, we submit that the district court properly dismissed the complaint because (1) petitioners failed to show that they had a sufficient legal interest to entitle them to enjoin this urban renewal project and (2) the actions of HUD that petitioners challenge did not violate Section 106.

1. In the *Data Processing* case, the Court held (slip op., pp. 3-4) that the question of standing "concerns * * * whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. * * *

That interest, at times, may reflect 'aesthetic conservational, and recreational' as well as economic values." Under this standard, at least some of the petitioners would appear to have standing to challenge HUD's approval of the urban renewal project.

Data Processing further held, however, that before persons with standing can prevail on the merits they must show not only a statutory violation but also that the statute involved gives them "a 'legal interest' which protects them against violations of those Acts" (slip op., p. 7). Petitioners have not shown that the action of HUD about which they complain has invaded any such "legal interest." As the district court pointed out, petitioners have no legal interest in compelling HUD to carry out the requirements of Section 106. Unlike the situation in *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (C.A. 2), none of the petitioners here is a resident displaced by the Lexington urban renewal plan, whose stake in the outcome of litigation would be far more personal and immediate than the purely aesthetic interests claimed to be invaded here. Petitioners Dennis and Kafoglis, the only owners of any property in the area, have already had adequate opportunity to protect their interests by participating in condemnation proceedings before the state courts (Pet. App. A-10-24). *Green Street Association* v. *Daley*, 373 F. 2d 1 (C.A. 7).

2. The courts below correctly held that HUD had not violated Section 106 of the National Historic Preservation Act. The requirements that that section imposes upon the Secretary—that he "take into account

the effect" of a federally-assisted undertaking upon any building that is listed on the National Register and give the Advisory Council "a reasonable opportunity to comment" about such undertaking—apply only "prior to the approval of the expenditure of any Federal funds on the undertaking." When HUD approved this urban renewal plan—both initially and the two amendments—the buildings here involved had not yet been placed on the National Register. The HUD approval, of course, covered not only the terms of the plan but also the expenditure of the federal funds involved.

The contrary interpretation of Section 106 that petitioners urge would seriously interfere with the effective functioning of the urban renewal program and would cause serious administrative problems. If petitioners are suggesting that before approving a plan HUD must determine not only whether any buildings in the area are listed on the Register but also whether there are other historic buildings in the area that might later be placed on the Register, the procedure would be unwieldy and result in substantial delay. Alternatively, if petitioners are arguing that after approving a plan HUD must check the Register each time that a further implementing step is proposed to be taken, this, too, would cause delay and serious administrative problems—particularly so since such implementing steps ordinarily are taken directly by the local authority rather than by HUD.

In short, the statute means what it says: that the Secretary's obligations under Section 106 relate only

to buildings that are on the Register at the time HUD finally approves a plan. There is no violation of Section 106 where, as here, HUD's last approval of the plan occurred before the buildings in the area involved had been listed on the Register.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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March, 1970.

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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1320

Supreme Court, U.S.
FILED
MAR 26 1970

SOUTH HILL NEIGHBORHOOD ASSOCIATION, JOHN F. DAVIS, JR., TIGE ITT, Et Al.,

Petitioners,

vs.

GEORGE ROMNEY, Secretary of Housing and Urban Development, Et Al.,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

RESPONSE TO MOTION OF NATIONAL TRUST FOR HISTORIC PRESERVATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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NATURE OF THESE PROCEEDINGS.

This action is before this Court on Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals which has not been granted. The National Trust for Historic Preservation in the United States has now filed with this Court a motion for leave to file Brief Amicus Curiae in support of Petition for a Writ of Certiorari pursuant to Rule 42.

REASONS WHY MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE SHOULD NOT BE GRANTED.

1. Pleadings Filed Thus Far Adequately Assert the Positions of the Respective Litigants and Further Pleading in This Matter Will Only Serve to Delay Any Action By This Court.

It is obvious from an examination of the Briefs filed by both the Petitioner and the Respondent that few words have been spared in presenting what each of the respective parties assert their rights to be. South Hill Neighborhood Association has filed its Petition as a non-profit corporation with its express purpose being the conservation and preservation of the various aesthetic interests of the public directed to that end. By use of the class action devise, South Hill asserts that it represents "historic preservation groups and persons similarly situated." The National Trust for Historic Preservation falls in this class.

Assuming that counsel for Petitioners has fulfilled his ethical obligation to devote himself fully to the interests of his client and to exhibit "warm zeal in the

maintenance and defense of his rights and the exertion of his utmost learning and ability," it must go without saying, that The National Trust for Historic Preservation in the United States is adequately represented in these proceedings.

Thus, any pleading allowed to be filed by such a group, already represented, would only serve to unnecessarily recapitulate that which has previously been asserted, necessitating delay to the Court inasmuch as Respondents, compelled by the same ethical obligation, must reply.

2. Replication on Behalf of These Respondents to Brief Amicus Curiae of the National Trust for Historic Preservation in the United States in Support of Petition for Certiorari Would Occasion Unnecessary Expense to the People of the City of Lexington and Fayette County, Kentucky.

Petitioners, who assert to represent the public in the matter before this Court, in fact are only asserting the aesthetic interests of a miniscule segment of the public. The public interest of primary importance in this litigation is the interest of the people of Lexington and Fayette County, Kentucky, in their efforts to promulgate and pursue a workable urban renewal plan. The history of this litigation discloses clearly the lengths to which the Petitioners have gone to destroy the urban renewal plan of the City of Lexington, not only the realization of the benefits to be derived from the completion of the plan, but its financial security and economic feasibility as well. This mat-

ter has been vigorously contested in the Courts of Fayette County; the Court of Appeals of the State of Kentucky, the United States District Court for the Eastern District of Kentucky, the United States Court of Appeals for the Sixth Circuit, and now in the United States Supreme Court. For all of this, the people of Lexington and Fayette County, Kentucky, have been forced to "pay the bill."

The granting of the motion herein contested would serve no purpose other than to increase the burden already forced upon these taxpayers. Thus, a reply to the Brief of The National Trust for Historic Preservation in the United States is an expense for which they can and should be spared.

3. The Motion for Leave to File Brief Amicus Curiae By the National Trust for Historic Preservation in the United States Is Both Untimely and Unnecessary.

The litigation under consideration in these proceedings presents a question which is not new, nor is it in any way dis-similar to the causes brought before two (2) state courts, two (2) federal courts and now finds its way to this the Supreme Court of these United States. Throughout the gambit of state and federal courts who have been exposed to this particular case, the issues have remained the same. The parties participating have fluctuated but the primary issues for determination have remained unchanged.

There have been numerious occasions when The National Trust for Historic Preservation in the United States could have sought to express their views in any

of the previous forums. There have been numerous opportunities where voluminous memorandum were submitted to these courts and at which time amicus intervention could have been sought. However, such has not been the case. The National Trust for Historic Preservation in the United States has allowed this litigation to go unchallenged, and it is at this late hour that they now seek to assert their position.

Their position, likewise, is not new, for it has been asserted most vehemently by the Petitioners throughout the exhaustive record now in the possession of this Court. It is submitted therefor that an amicus brief addressed to the virtues of historic preservation in the United States is both untimely and unnecessary.

CONCLUSION.

It is respectfully concluded that the Motion of The National Trust for Historic Preservation in the United States for leave to file Brief Amicus Curiae should be denied since:

(a) Pleadings filed thus far adequately assert the positions of the respective litigants and further pleadings in this matter will only serve to delay any action by this Court.

(b) Replication on behalf of these respondents to brief amicus curiae of The National Trust for Historic Preservation in the United States in support of petition for certiorari would occasion unnecessary expense to the people of the City of Lexington and Fayette County, Kentucky.

(c) The motion for leave to file brief amicus curiae by The National Trust for Historic Preservation in the United States is both untimely and unnecessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, J. Montjoy Trimble, Attorney for the Respondents, The City of Lexington, Kentucky, Charles Wylie, Joseph Graves, Harry Sykes, Fred Eugazzi, Thomas Underwood, Urban Renewal and Community Development Agency of the City of Lexington, Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble, H. J. Hagler, and Jennie Bryant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of March, 1970, I served copies of the foregoing Response of Certain Respondents to the Motion of the National Trust for Historic Preservation in the United States for Leave to File Brief Amicus Curiae on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530.

2. On the Department of Housing and Urban Development, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its General Counsel, at his office, Washington, D. C. 20510.

3. On the Respondent, Citizens Union National Bank & Trust Company, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its attorneys of record, A. Gene Oliver of Strother, Oliver & Strother, Citizens Union Bank Building, Lexington, Kentucky 40507.

4. On the Respondents, J. Norwood Hodge and Norwood Construction Company, Inc., by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record, A. B. Rouse of Fowler, Rouse, Measle & Bell, 141 North Upper Street, Lexington, Kentucky 40507.